



2012

# The Education Duty

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## Recommended Citation

Scott R. Bauries, *The Education Duty*, 47 Wake Forest L. Rev. 705 (2012).

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# THE EDUCATION DUTY

Scott R. Bauries\*

## INTRODUCTION

A constitution is an instrument of entrustment. By adopting a democratic constitution, a polity places in the hands of its elected representatives its trust that those representatives will act to pursue the ends of the polity, rather than their own ends, and that they will do so with an eye toward the effects of adopted policies. In effect, the polity entrusts lawmaking power to its legislature with the expectation that such power will be exercised with loyalty to the public and with due care for its interests. Simply put, legislatures are fiduciaries.<sup>1</sup>

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\* Robert G. Lawson Associate Professor of Law, University of Kentucky. My heartfelt thanks to the participants at the Washington University Junior Faculty Colloquium and the National Education Finance Conference, as well as to Joshua Douglas, Nicole Huberfeld, Kent Barnett, William Thro, R. Craig Wood, Harold Lewis, and Justin Long for helpful comments on the manuscript at earlier stages. Thanks also to the editors of the *Wake Forest Law Review* for their careful editing and to the University of Kentucky for supporting this research. Errors and omissions are, of course, my own.

1. This view of representative government is now ascendant in the scholarship not only of constitutional law but also of other areas of public law. See, e.g., EVAN FOX-DECENT, SOVEREIGNTY'S PROMISE: THE STATE AS FIDUCIARY 23–51 (2011); GARY LAWSON ET AL., THE ORIGINS OF THE NECESSARY AND PROPER CLAUSE 56–57 (2010); Evan J. Criddle, *Fiduciary Foundations of Administrative Law*, 54 UCLA L. REV. 117, 120 (2006); Evan Fox-Decent, *The Fiduciary Nature of State Legal Authority*, 31 QUEEN'S L.J. 259, 260–61 (2005); David Jenkins, *The Lockean Constitution: Separation of Powers and the Limits of Prerogative*, 56 MCGILL L.J. 543, 565–66 (2011); Sung Hui Kim, *The Last Temptation of Congress: Legislator Insider Trading and the Fiduciary Norm Against Corruption*, 98 CORNELL L. REV. (forthcoming 2013); Ethan J. Leib & David L. Ponet, *Fiduciary Representation and Deliberative Engagement with Children*, 20 J. POL. PHIL. 178, 179 (2012), available at <http://onlinelibrary.wiley.com/doi/10.1111/j.1467-9760.2011.00398.x/pdf>; Ethan J. Leib et al., *A Fiduciary Theory of Judging*, 101 CAL. L. REV. (forthcoming 2013) [hereinafter Leib et al., *Judging*]; Robert G. Natelson, *The Agency Law Origins of the Necessary and Proper Clause*, 55 CASE W. RES. L. REV. 243, 247, 274, 284–87 (2004) [hereinafter Natelson, *Agency*]; Robert G. Natelson, *The Government as Fiduciary: A Practical Demonstration from the Reign of Trajan*, 35 U. RICH. L. REV. 191, 192 (2001); Robert G. Natelson, *Judicial Review of Special Interest Spending: The General Welfare Clause and the Fiduciary Law of the Founders*, 11 TEX. REV. L. & POL. 239, 245–46 (2007) [hereinafter Natelson, *Welfare*]; David

In this Article, I examine the nature of the fiduciary duties that state constitutions place on state legislatures. Generally, I develop the concepts of legislative duties of loyalty and care and propose principles for the enforcement of these duties. Specifically, I consider how these duties might function in the context of the affirmative obligations that state constitutions place on state legislatures to pursue certain policy goals.<sup>2</sup> Ultimately, I present the case that specific affirmative duties placed upon legislatures by state constitutions are governed by general fiduciary duties, and that they ought to be adjudicated as such, using the tools of deference appropriate to the review of discretionary decisions by individuals in positions of trust.

One policy area in which every state constitution imposes specific affirmative obligations is education, and education is the one area in which courts in nearly all American states have been asked to enforce such affirmative obligations.<sup>3</sup> Accordingly, I focus my analysis on what I term “the education duty.” I define the duty as a mandatory specific obligation of the state legislature, which also carries with it a general duty of care. Contrary to the existing scholarship and case law, I argue that, although the education duty in each state’s constitution should be subject to judicial enforcement, the proper focus of judicial review should be the general duty of care imposed by each state’s constitution, rather than the nebulous qualitative terms contained in each state’s education clause.<sup>4</sup> Approaching enforcement as an application of the qualitative terms

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L. Ponet & Ethan J. Leib, *Fiduciary Law’s Lessons for Deliberative Democracy*, 91 B.U. L. REV. 1249, 1249–50 (2011); D. Theodore Rave, *Politicians as Fiduciaries*, 126 HARV. L. REV. (forthcoming Jan. 2013).

2. Throughout this Article, I use the terms “positive” and “affirmative” interchangeably, as the scholarship does. See, e.g., Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 HARV. L. REV. 1131, 1133 (1999) (employing both terms throughout).

3. See, e.g., *id.* at 1186 (using education as the exemplar of positive rights that can be enforced). The literature on this topic is voluminous. For three very recent treatments of the debates surrounding education litigation under state constitutions, see generally Scott R. Bauries, *State Constitutions and Individual Rights: Conceptual Convergence in School Finance Litigation*, 18 GEO. MASON L. REV. 301, 321–25 (2011); Derrick Darby & Richard E. Levy, *Slaying the Inequality Villain in School Finance: Is the Right to Education the Silver Bullet?*, 20 KAN. J.L. & PUB. POL’Y 351, 354–56 (2011); William E. Thro, *School Finance Litigation as Facial Challenges*, 272 EDUC. L. REP. 687 (2011). Foreign courts have attempted to enforce other affirmative obligations, such as a positive right to housing. See generally *Govt. of the Rep. of S. Afr. v. Grootboom* 2001 (1) SA 46 (CC) (S. Afr.) (holding that forced evictions violate individual rights to housing and ordering the legislature to craft a plan for dealing with homelessness).

4. I use the term “education clause” throughout to denote the clause in each state’s constitution that mandates the legislative provision for an education system. See *infra* note 61 (citing the education clauses of the fifty state constitutions).

in the education clause has resulted in both overenforcement and underenforcement of the education duty. Moving the focus of judicial review to the underlying duty of care will remedy both of these problems and preserve a role for the judiciary in ensuring the legislature's performance of its constitutional obligations, while also protecting the separation of powers in state governments.

This Article proceeds in three subsequent Parts. Part I sets the stage for the discussion that follows by distinguishing between negative and positive constitutional rights, and further distinguishing between positive constitutional rights and duties, as discussed in the constitutional law cases and scholarship. Part II then sets about identifying and defining a duty-based approach to constitutional analysis, focusing on the provisions in every state constitution mandating the legislative provision of a system of education. Drawing from the history and political theory underlying constitutionalism in the United States, from the current texts of the fifty state constitutions and from the history of litigation over these provisions, I establish that state legislative duties in general, and affirmative legislative duties in particular, are fiduciary duties to the public as a whole. I ultimately develop a conception of the fiduciary foundations of the legislative duty to provide for education.

In Part III, I then outline how state courts might alter their approaches to enforcement of the education duty and other similar duties to reflect these fiduciary foundations. Ultimately, I conclude that a fiduciary duty-based approach to affirmative constitutional provisions will allow for enforcement without institutional encroachment and will provide the necessary space for a principled consideration of whether individual rights to education and other public services exist and whether they are enforceable.

## I. CONSTITUTIONAL RIGHTS AND DUTIES

In the part below, I begin by laying out the familiar conceptual distinction between positive rights and negative rights.<sup>5</sup> This distinction sets the stage for the more difficult, and more important, distinction between positive rights and positive duties.<sup>6</sup> These distinctions help to show that the affirmative duty provisions in state constitutions are *sui generis* in constitutional law and theory,

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5. This distinction tracks, but does not exactly duplicate, the familiar distinction that international law makes between "first generation" (or political) rights and "second generation" (or socioeconomic) rights. See Jeffrey Omar Usman, *Good Enough for Government Work: The Interpretation of Positive Constitutional Rights in State Constitutions*, 73 ALB. L. REV. 1459, 1464 (2010).

6. This distinction is rarely made in the constitutional law scholarship. In fact, as Professor Robin West explains, where constitutional law theorists mention affirmative legislative duties, they generally do so only after recognizing prior affirmative individual rights. Robin West, *Unenumerated Duties*, 9 U. PA. J. CONST. L. 221, 224 (2006).

and they therefore require a unique approach to judicial review. This approach asks us to step back from the hopelessly indeterminate, and therefore unhelpful, text of such provisions and to consider their overall structure and the political theory of government embodied in that structure, and then calibrate the appropriate level of judicial deference that is owed to legislative action under these provisions.<sup>7</sup>

A. *Negative and Positive Constitutional Rights*

Scholarship of constitutional law is permeated with “rights talk.”<sup>8</sup> This is true in the federal context, where the Constitution places limitations on the use of federal power and often speaks of rights specifically and therefore seems to call up a rights-focused analytical framework. But it is also true in the scholarship of state constitutions and the national constitutions adopted primarily after World War II, which, in addition to containing express limitations on the use of government power through the articulation of rights, expressly call for the use of government power to achieve certain social policy goals.<sup>9</sup> In this latter case, a rights-focused approach is neither inevitable nor necessarily desirable, though rights talk has overwhelmingly dominated the debates over interpretation and enforcement.<sup>10</sup>

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7. My analysis excepts out of its prescriptions precise affirmative duties, such as the duty under the Florida Constitution to limit class sizes to a certain number of students depending on the grade. FLA. CONST. art. IX, § 1(a)(1)–(3). As we shall see, most affirmative state and national constitutional provisions are much more vague, calling for a holistic approach to interpretation and construction. See *infra* notes 62–74 and accompanying text.

8. Mary Ann Glendon coined this term as part of her seminal monograph on the perversion of civil and political discourse through the overly casual rhetoric of rights. See MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* 14 (1991).

9. See, e.g., S. AFR. CONST. ch. 2, § 29(1), 1996, available at <http://www.info.gov.za/documents/constitution/1996/96cons2.htm#29> (last visited Aug. 22, 2012) (“Everyone has the right to a basic education, including adult basic education; and to further education, which the state, through reasonable measures, must make progressively available and accessible.”); Hershkoff, *supra* note 2, at 1187–89; Usman, *supra* note 5, at 1461.

10. For a recent example of this tendency within a very well-argued and cogent article, one which is quite typical of the scholarly discourse in this area, see Usman, *supra* note 5, at 1461 (“Unlike their federal counterpart, state constitutions unambiguously confer positive constitutional rights.”). As I will show, other than a few outlier provisions specifically mentioning affirmative rights, this conclusion—widely expressed in the scholarship—is based entirely on state constitutional language establishing affirmative legislative duties rather than individual rights. In fact, only the North Carolina Constitution can reasonably be said to “unambiguously” establish a positive constitutional right to education. See N.C. CONST. art. I, § 15 (“The people have a right to the privilege of education, and it is the duty of the State to guard and maintain that right.”). Illustrating the breadth of the acceptance of the point, at different

One important conceptual distinction that has informed the debate has been that between negative constitutional rights and positive constitutional rights. As Professor David Currie explains, a negative right allows its holder to prevent government action against the holder, while a positive or affirmative right entitles its holder to demand government action.<sup>11</sup>

Numerous scholars, and some courts, have criticized this distinction, arguing that if it exists, the distinction is not a categorical one but rather a continuum.<sup>12</sup> Under this widely held view, even ostensible negative rights require some government action or expenditure to effectuate them; therefore, all rights have some affirmative character.<sup>13</sup> For example, many criminal defendants are entitled to legal representation provided by the state. If this is so, the continuum theorists argue, then the right to counsel is at least in part a positive right.<sup>14</sup>

Similarly, in order for individuals to be able to freely speak their minds, it is necessary that public spaces are provided, are maintained, and are made safe, for example by providing police protection to unpopular speakers to prevent a "heckler's veto."<sup>15</sup> All of this requires government action and expenditure, and all of it is, in some sense, mandated by the Constitution; therefore freedom of speech is a kind of positive right, the argument goes.<sup>16</sup> But this view misperceives the distinction it proposes to eliminate (the distinction between rights *against* government action and rights *requiring* government action).<sup>17</sup> Both the right to counsel and the right to protection of unpopular speakers are practical applications of underlying rights against government action, and neither of these "rights" would exist in any situation where government were not to first act against an individual. The right to the "Assistance of Counsel," as articulated in the Sixth Amendment, is not a free-standing entitlement but is predicated on one's first having the

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points in his fine article, Usman cites numerous other scholars, including the leaders in the field of state constitutional law, as holding the same view. See generally Usman, *supra* note 5. As a further example of the tendency that exists among most scholars and courts, Usman begins his part on the positive "rights" that exist in state constitutions by listing several types of affirmative duties that state constitutions establish without mentioning rights, or even mentioning individuals. See *id.* at 1464–65.

11. See David P. Currie, *Positive and Negative Constitutional Rights*, 53 U. CHI. L. REV. 864, 874 (1986) (distinguishing between positive remedies for negative rights violations and positive constitutional rights themselves).

12. See, e.g., Usman, *supra* note 5, at 1462–63.

13. *Id.* at 1463.

14. See Mark Tushnet, *Social Welfare Rights and the Forms of Judicial Review*, 82 TEX. L. REV. 1895, 1896 (2004).

15. See *id.*; see also *id.* at 1896 n.7 (explaining the term "heckler's veto," as coined by Harry Kalven, Jr.).

16. *Id.* at 1896.

17. See Currie, *supra* note 11, at 873.

status of a "criminal defendant."<sup>18</sup> No person has this status automatically by birth. Rather, the state must *act* to place this status on a person.

The right to protection against a "heckler's veto"—which in extreme cases would seem to require that a city police department expend resources to protect unpopular speakers from physical harm—is the best example of a true positive right, if it were to actually *require* the expenditure of public resources absent prior state action.<sup>19</sup> But as a matter of current law, it does not. Most cases identified as heckler's veto cases involve police attempting to *remove* an unpopular speaker from a public forum to protect the speaker's safety—to act *against* an individual speaker.<sup>20</sup> In these cases, it is generally true that the remedy against "hecklers" of unpopular speakers cannot be to remove the speaker, as that would be a direct infringement of the speaker's right to speak. Thus, it is a prohibition against government action—the same as any other constitutional right.

The closest that the Supreme Court has ever come to recognizing the protection against heckler's vetoes as a positive right was its holding in *Forsyth County v. Nationalist Movement*.<sup>21</sup> The Court held that city officials were not permitted to charge an unpopular group more for a speaking permit than more mainstream groups on the grounds that more police protection would be needed

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18. U.S. CONST. amend. VI.

19. Illustrating the contested nature of this point, Professor Tushnet, in using the example, introduces it with the conditional statement, "if free speech law rejects the 'heckler's veto' . . . ." Tushnet, *supra* note 14, at 1896.

20. See *Kunz v. New York*, 340 U.S. 290, 311–12 (1951) (prohibiting the removal of the unpopular speaker from the public forum as a way of dealing with hecklers, but not mandating any other remedy or any remedy at all); see also *Bachellar v. Maryland*, 397 U.S. 564, 567 (1970); *Cox v. Louisiana*, 379 U.S. 536, 551–52 (1965); *Niemotko v. Maryland*, 340 U.S. 268, 282, 289 (1951); *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 502 (1939); Richard A. Posner, *Pragmatism Versus Purposivism in First Amendment Analysis*, 54 STAN. L. REV. 737, 742 (2002) ("[T]he Supreme Court has made clear that government cannot, by banning unpopular speakers in order to prevent disorder, allow a 'heckler's veto.'") (citing *Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 134–35 (1992); *Terminiello v. City of Chicago*, 337 U.S. 1, 4–5 (1949)). But see *Niemotko*, 340 U.S. at 288–89 (Frankfurter, J., concurring) ("As was said in *Hague v. C. I. O.*, uncontrolled official suppression of the speaker 'cannot be made a substitute for the duty to maintain order.' Where conduct is within the allowable limits of free speech, the police are peace officers for the speaker as well as for his hearers. But the power effectively to preserve order cannot be displaced by giving a speaker complete immunity. Here, there were two police officers present for 20 minutes. They interfered only when they apprehended imminence of violence. It is not a constitutional principle that, in acting to preserve order, the police must proceed against the crowd, whatever its size and temper, and not against the speaker." (citations omitted)).

21. 505 U.S. 123 (1992).

for the unpopular group.<sup>22</sup> In practical terms, this holding means that cities wishing to expend resources to protect speakers from hecklers must expend greater resources to protect unpopular speakers, whether these cities wish to do so or not. Stated this way, police protection against hecklers sounds like a positive right. In response to the Court's decision in *Nationalist Movement*, however, a city might decide that it must provide police protection for no fee or a nominal fee, or it might decide not to provide police protection at all. If a city chooses to provide protection, it is not permitted to decide the price of that protection based on the message to be protected. Nothing in the *Nationalist Movement* case, or in any other heckler's veto case, however, makes it a constitutional compulsion for a city to provide police protection for speakers—popular or unpopular.<sup>23</sup>

Thus, neither of these rights—the two best candidates thus far offered for positive federal constitutional rights—can be violated by the government unless the government first takes some action. In the case of the right to counsel, the government must first arrest a suspect and then propose to put the suspect on trial for a crime. Only then does the government's obligation to provide counsel arise.<sup>24</sup> If the government wishes to avoid providing counsel to indigent defendants, it need only stop arresting them. The fact that this solution would be impractical or unwise does not make it unconstitutional. If failure to arrest at all would be constitutional, and if an arrest and a criminal charge are preconditions to the right to counsel, then the right to counsel is not itself a positive right but is a precondition for the exercise of discretionary state power.

In the case of freedom of expression, the analysis is similar. Concepts of freedom of expression as a fully self-actualized opportunity to speak one's mind in an open, available, safe place with lots of people listening are simply not part of the right, and the Court has never so held. Were the law otherwise, then an individual speaker could compel a municipality to set up and fund a public park where none currently exists. True, governments around the country act, as a matter of policy, to provide safe venues for expression, but as with the arresting of criminal suspects, the

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22. *Id.* at 134 ("The fee assessed will depend on the administrator's measure of the amount of hostility likely to be created by the speech based on its content. Those wishing to express views unpopular with bottle throwers, for example, may have to pay more for their permit.").

23. See *Kunz*, 340 U.S. at 311–12 (prohibiting the removal of the unpopular speaker from the public forum as a way of dealing with hecklers, but not mandating any other remedy or any remedy at all); see also *Bachellar*, 397 U.S. at 567; *Cox*, 379 U.S. at 551; *Niemotko*, 340 U.S. at 289 (Frankfurter, J., concurring) ("It is not a constitutional principle that, in acting to preserve order, the police must proceed against the crowd, whatever its size and temper, and not against the speaker."); *Hague*, 307 U.S. at 502.

24. U.S. CONST. amend. VI.



practical value of the government activity does not render it constitutionally compelled.

Professor Frank Cross has explained this distinction succinctly.<sup>25</sup> As Cross explains, distinguishing between a positive right and a negative right is as simple as imagining a world without government or where government action is impossible.<sup>26</sup> In such a world, a negative right could not possibly be violated, while a positive right would always be violated. In explaining the distinction this way, Cross elucidates a vital point: our rights are legally meaningless<sup>27</sup> until we decide against whom these rights run, and what obligations these rights place on the entities against whom they run.<sup>28</sup> Only then can we decide whether our rights are enforceable in court and to what extent they may be enforced. Applying this conception to the rights to counsel and police protection against a heckler's veto leads to the conclusion that both are extensions of decidedly negative rights, respectively against conviction by trick or surprise and against viewpoint discrimination. Neither can possibly be violated in a world without government action.

Therefore, although it is common in legal scholarship to reject "formalistic" distinctions between positive rights and negative rights,<sup>29</sup> the distinction clearly exists in American constitutional law, and it provides a useful way of talking about the relationship between the individual and the activist state in the modern world.<sup>30</sup> The distinction between positive and negative rights is familiar,

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25. Frank B. Cross, *The Error of Positive Rights*, 48 UCLA L. REV. 857, 863–78 (2001); see also Cass R. Sunstein, *Against Positive Rights*, in WESTERN RIGHTS?: POST-COMMUNIST APPLICATION 225, 225–32 (András Sajó ed., 1996).

26. Cross, *supra* note 25, at 866.

27. The varying debates about the moral and political status of rights are rich and interesting but beyond the scope of this Article. For further reading on the moral status of rights, see generally TIBOR R. MACHAN, *INDIVIDUALS AND THEIR RIGHTS* (1989). For further reading on the political dimension of rights, see generally MICHAEL FREEDEN, *RIGHTS* (1991).

28. See Nicholas Quinn Rosenkranz, *The Subjects of the Constitution*, 62 STAN. L. REV. 1209, 1210–11 (2010) (making this argument as part of a textualist reading of the Constitution).

29. See, e.g., Lynn P. Freedman, *Reflections on Emerging Frameworks of Health and Human Rights*, 1 HEALTH & HUM. RTS. 314, 324 (1998).

30. Nevertheless, another useful distinction, which may be more palatable to those who reject the former, is that between so-called "first-generation" and "second-generation" rights, with the former being political rights, such as the freedom of speech and religion, and the latter being primarily socio-economic rights, such as the right to education, health care, or a clean environment. Usman, *supra* note 5, at 1464. This distinction maps fairly cleanly onto the distinction between positive and negative rights, where negative rights (accepting my distinction for the sake of argument) are those rights traditionally viewed as first-generation rights, and positive rights are those rights traditionally viewed as second-generation rights. I am certainly not the first to suggest the congruence of these ideas. See, e.g., *id.* at 1461.

even though not universally accepted.<sup>31</sup> The next Subpart focuses on a less explored distinction, but one that is more meaningful if we hope to understand the meaning of affirmative obligations in state constitutions—the distinction between positive rights and positive duties.

### B. *Positive Constitutional Duties*

Aside from rights, plausible arguments exist that all constitutions impose duties on the government. Like the more commonly discussed categories of positive rights, such duties require government action of some sort. In fact, it is plausible to claim, as some scholars have suggested, that positive rights impose correlative positive duties on government.<sup>32</sup> However, this correlation does not necessarily run both ways. It is possible to conceive of governmental duties that exist but do not run to individuals or create any individual rights to enforcement. The President's duty to "take Care that the Laws be faithfully executed"<sup>33</sup> and the obligation of the United States to "guarantee to every State in this Union a Republican Form of Government"<sup>34</sup> under the Constitution come to mind. In the discussion that follows, I focus my attention on the prospect of a legislative duty to legislate as a free-standing duty that does not depend on the existence of any individual positive right.

The idea of a legislative duty to legislate does not find much purchase in legal scholarship, though as an idea it has an impressive pedigree. Legislative duty can be thought of as a central part, or at least a natural implication, of the work of such diverse political theorists as Immanuel Kant, Thomas Hobbes, John Locke, Jeremy Bentham, John Stuart Mill, and Thomas Paine, among others.<sup>35</sup> Legal philosophers such as John Finnis have developed

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31. See *supra* notes 25–28 and accompanying text (discussing the critiques of the distinction).

32. Steven G. Calabresi & Sarah E. Agudo, *Individual Rights Under State Constitutions When the Fourteenth Amendment Was Ratified in 1868: What Rights Are Deeply Rooted in American History and Tradition?*, 87 TEX. L. REV. 7, 108–09 (2008).

33. U.S. CONST. art. II, § 3.

34. *Id.* art. IV, § 4.

35. See Leslie Green, *The Duty to Govern*, 13 LEGAL THEORY 165, 165 (2007) (adding John Finnis and Thomas Aquinas to the list); Robert G. Natelson, *The Constitution and the Public Trust*, 52 BUFF. L. REV. 1077, 1097–1108 (2004) [hereinafter Natelson, *Public Trust*] (adding other political thinkers such as Plato, Cicero, Aristotle, and Grotius to the list); Natelson, *Welfare*, *supra* note 1, at 245 (discussing Aristotle, Cicero, and Locke); West, *supra* note 6, at 221–23, 240 (discussing the named scholars); see also Ekow N. Yankah, *When Justice Can't Be Done: The Obligation to Govern and Rights in the State of Terror*, L. & PHIL. (forthcoming 2012), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2009944](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2009944) (discussing many of the scholars mentioned above, particularly Finnis, Aristotle, Aquinas, Hobbes, and Kant).

normative accounts of the duty to govern from concepts of natural law,<sup>36</sup> and these accounts have gained significant texture over time due to the work of later scholars.<sup>37</sup> Nevertheless, the bulk of the philosophy of law regarding the broad idea of governing focuses on three concepts separate from legislative duty—individual rights, legislative authority, and the individual's obligation to obey law.<sup>38</sup>

In state and federal constitutional law, the scholarship is heavily focused on individual rights and government powers and pays very little attention to the prospect of governmental duties.<sup>39</sup> For example, a mountain of scholarship exists on the contested subject of unenumerated rights under the Constitution, but a comparative molehill of scholarship exists examining the related idea of unenumerated legislative duties.<sup>40</sup>

This dearth of commentary is not for the lack of importance of the idea of legislative duty. Professor Robin West points out that the idea of legislative duty, encompassing both a duty "to legislate—and to do so toward particular ends," forms one of the pillars of liberal political thought.<sup>41</sup> West further points out, however, that, to the extent that the extant scholarship hints at conceptions of positive legislative duties as a constitutional principle, it does so either as a way of illustrating the content of presupposed individual positive rights or as a way of "tak[ing] the judiciary off the hook," by establishing residual moral legislative duties where the judiciary cannot enforce what would otherwise be positive constitutional entitlements.<sup>42</sup> She pointedly asserts that, in the absence of a plausible argument for the analytically prior existence of individual positive rights, constitutional theorists generally neglect discussion of legislative duties to legislate.<sup>43</sup>

In federal constitutional law, this omission of duty-based analysis is somewhat understandable, as the Constitution does not

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36. JOHN FINNIS, *AQUINAS: MORAL, POLITICAL, AND LEGAL THEORY* 91 (1998); JOHN FINNIS, *NATURAL LAW & NATURAL RIGHTS* 246 (1980).

37. Green, *supra* note 35, at 184; Natelson, *Welfare*, *supra* note 1, at 245; West, *supra* note 6, at 223; Yankah, *supra* note 35.

38. See Green, *supra* note 35, at 166 (commenting that, given these other subjects of focus in the scholarship, the idea of duties to govern may seem "quaint"); Yankah, *supra* note 35.

39. West, *supra* note 6, at 221. Perhaps the one exception is the area of "positive rights," where any such rights would seem to correlate by nature with affirmative government duties. Nevertheless, even this burgeoning body of scholarship speaks of duties mostly as an afterthought and only in the context of fleshing out the content of positive rights—not the other way around. See *id.* at 228.

40. *Id.* at 221.

41. *Id.* at 223.

42. *Id.* at 228.

43. *Id.*

contain many affirmative obligatory statements.<sup>44</sup> It may be, then, that the Constitution simply will admit no affirmative legislative duties to legislate, perhaps because the Framers chose to enumerate few affirmative obligations in the Constitution, none of which expressly require Congress to enact legislation.<sup>45</sup> However, as West points out, even to the extent that the Constitution embraces unenumerated legal principles, the scholarship has single-mindedly focused on rights, leaving the idea of unenumerated duties unexplored.<sup>46</sup> Perhaps the structure of the federal document—as a grant of limited and enumerated powers—forestalls an “unenumerated duties” interpretation where it may not foreclose an “unenumerated rights” interpretation.<sup>47</sup>

State constitutions, however, both in their legislative articles and, more commonly, in separate policy-focused articles directed at state legislatures, contain numerous explicit affirmative obligations, and such provisions also have appeared prominently in national constitutions adopted around the world in the years since World

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44. The few it does contain are the “Take Care” Clause, U.S. CONST. art. II, § 3 (“[H]e shall take Care that the Laws be faithfully executed . . .”); the Guarantee Clause (also called the “Republican Form of Government” Clause), *Id.* art. IV, § 4; and the Protection from Invasion Clause in the same section, *id.* Each of these imposes a non-relative, substantive obligation on a branch of the federal government, or the federal government itself. Of course, in addition to these more substantive obligations, the Constitution establishes various procedural obligations, such as that the President give the State of the Union Address periodically, *Id.* art. II, § 3; and that the Congress meet in session at least once each year, *Id.* art. I, § 4, cl. 2. Other than these sections and a few other procedural requirements, the Constitution consists entirely of (1) grants of power to the various branches of government; (2) prohibitions on the use of such power in certain circumstances; and (3) reservations of rights.

45. Congress is arguably required to enact legislation to fund the other branches of government based at least on the mentions of the compensation of the members of these branches. *See id.* art. II, § 1, cl. 7; *Id.* art. III, § 1 (I am indebted to Justin Long for this insight). But this requirement, if it is actually operative against Congress, is implied rather than express. Although it can be argued that both the Guarantee Clause and the Protection from Invasion Clause, *id.* art. IV, § 4, operate as legislative duties to legislate, neither *requires* the enactment of legislation because neither is directed at Congress itself. Further, the former of these clauses consistently has been viewed as nonjusticiable in the federal courts. *See, e.g.,* *Mountain Timber Co. v. Washington*, 243 U.S. 219, 234 (1916) (holding that the Guarantee Clause is a question for Congress rather than the judiciary). This has had the effect of rendering the clause “a constitutional dead letter.” *See* Erwin Chemerinsky, *Cases Under the Guarantee Clause Should Be Justiciable*, 65 U. COLO. L. REV. 849, 852 (1994).

46. West, *supra* note 6, at 228.

47. *But see* Green, *supra* note 35, at 171 (outlining Finnis’s idea that the power to govern and the duty that resides in the people to obey gives rise to a duty to govern on the part of the entity holding the power to govern).

War II.<sup>48</sup> The prevalence of these provisions has allowed for both courts and commentators to consider whether legislative duties exist and whether they may be enforced. But the bulk of scholarly commentary has defaulted to discussing these provisions in a rights-focused frame, leaving the equally important idea of legislative duties relatively unexplored.<sup>49</sup>

In state constitutional education cases, the courts more often directly address the concept of legislative duty, as words such as "shall" often appear in state constitutional education clauses. But,

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48. See, e.g., S. AFR. CONST. ch. 2, § 29(1), 1996, available at <http://www.info.gov.za/documents/constitution/1996/96cons2.htm#29> ("Everyone has the right to a basic education, including adult basic education; and to further education, which the state, through reasonable measures, must make progressively available and accessible."); see also Tushnet, *supra* note 14, at 1913–15. See generally Usman, *supra* note 5.

49. See generally Helen Hershkoff, *Foreword: Positive Rights and the Evolution of State Constitutions*, 33 RUTGERS L.J. 799 (2002); Hershkoff, *Positive Rights*, *supra* note 2; Helen Hershkoff, *Welfare Devolution and State Constitutions*, 67 FORDHAM L. REV. 1403 (1999) [hereinafter Hershkoff, *Welfare Devolution*]; Allen W. Hubsch, *The Emerging Right to Education Under State Constitutional Law*, 65 TEMP. L. REV. 1325, 1325 (1992) ("In the past two decades, many state supreme courts have addressed for the first time the import and meaning of the education articles of their state constitutions. As a result, a new body of state constitutional law regarding the right to education has emerged."); Molly S. McUsic, *The Future of Brown v. Board of Education: Economic Integration of the Public Schools*, 117 HARV. L. REV. 1334, 1345 (2004) ("In [state equal protection] cases that succeeded, courts found education to be a fundamental right under state constitutions at least in part by relying on the inclusion in their state constitutions of a right to education."); Burt Neuborne, *Foreword: State Constitutions and the Evolution of Positive Rights*, 20 RUTGERS L.J. 881 (1989); Michael A. Rebell, *Poverty, "Meaningful" Educational Opportunity, and the Necessary Role of the Courts*, 85 N.C. L. REV. 1467, 1540 (2007) ("The courts' role in articulating constitutional principles and affirming the right of all children to an adequate and meaningful educational opportunity is of paramount importance."); Julia A. Simon-Kerr & Robynn K. Sturm, *Justiciability and the Role of the Courts in Adequacy Litigation: Preserving the Constitutional Right to Education*, 6 STAN. J. CIV. RTS. & CIV. LIBERTIES 83 (2010); Paul L. Tractenberg, *The Evolution and Implementation of Educational Rights Under the New Jersey Constitution of 1947*, 29 RUTGERS L.J. 827, 888 (1998) (speaking of the judicial interpretation of the affirmative duty language in the New Jersey Constitution, which states that "[t]he right is personal to and enforceable by the state's children, and it has been construed to embody a very high-level of educational opportunity sufficient to enable disadvantaged urban students to be able to compete with their advantaged suburban peers in the world beyond the schoolhouse"). To be sure, not all of the rights-focused analyses have been supportive of the role of individual rights in school finance adequacy litigation. See, e.g., Darby & Levy, *supra* note 3, at 361–65. An early and much-cited article took a more narrow duty-based approach, focusing on the schools themselves, rather than state legislatures, and that article remains notable as one of very few examples of duty-focused analyses. Gershon M. Ratner, *A New Legal Duty for Urban Public Schools: Effective Education in Basic Skills*, 63 TEX. L. REV. 777, 814 (1985) ("The most direct sources of the duty to educate are state constitutions.").

as the next Part demonstrates, these courts generally conceive of the legislative duty in absolutist terms, requiring the establishment of a school system that qualitatively seems to the justices in its actual operation to be “adequate,” or some variant thereof, and usually purport to do so in the context of individual rights.<sup>50</sup> This substance-oriented, absolutist approach often fails to achieve the adequacy that the courts claim to seek and sometimes even results in the courts conceding the issue back to the legislatures after prolonged institutional conflicts.<sup>51</sup> In the next Part, I argue that rather than approaching affirmative duty provisions in state constitutions in this way, state courts should address affirmative duties as the fiduciary duties they are by switching from such a substance-oriented approach of review to a more process-oriented form of review.

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50. See, e.g., *Lake View Sch. Dist. No. 25 v. Huckabee*, 91 S.W.3d 472, 495 (Ark. 2002) (considering the efforts of other state supreme courts to derive a fundamental right to education from their education clauses and holding, “[n]evertheless, because we conclude that the clear language of Article 14 imposes upon the State an absolute constitutional duty to educate our children, we conclude that it is unnecessary to reach the issue of whether a fundamental right is also implied”) *overruled on other grounds* by 142 S.W.3d 643 (Ark. 2004); *McDuffy v. Sec’y Exec. Office Educ.*, 615 N.E.2d 516, 526 (Mass. 1993) (“[I]t is reasonable therefore to understand the duty to ‘cherish’ public schools as a duty to ensure that the public schools achieve their object and educate the people.”); *Claremont Sch. Dist. v. Governor*, 635 A.2d 1375, 1378 (N.H. 1993) (“We do not construe the terms ‘shall be the duty . . . to cherish’ in our constitution as merely a statement of aspiration. The language commands, in no uncertain terms, that the State provide an education to all its citizens and that it support all public schools.”); *Abbeville Cnty. Sch. Dist. v. State*, 515 S.E.2d 535, 541 (S.C. 1999) (“Finally, we emphasize that the constitutional duty to ensure the provision of a minimally adequate education to each student in South Carolina rests on the legislative branch of government.”).

51. See *Ala. Coal. for Equity, Inc. v. Hunt*, 64 So. 2d 107, 154 (Ala. 1993) (“By imposing upon the state a duty to organize and maintain a system of education, § 256 also implies a continuing obligation to ensure compliance with evolving educational standards. Section 256’s requirement that the system operate ‘for the benefit’ of school-age children likewise obligates the state to provide its children with an education that will *in fact* benefit them by offering them appropriate preparation for the responsible duties of life.”). This decision led to almost a decade of legislative recalcitrance, ultimately resulting in total judicial abdication of the constitutional question. See *Ex parte James*, 836 So. 2d 813, 819 (Ala. 2003) (dismissing the ongoing case as a nonjusticiable political question); *DeRolph v. State*, 780 N.E.2d 529, 529–32 (Ohio 2002) (following a similar progression, although resulting not in a retroactive holding of nonjusticiability but a prospective release of jurisdiction, despite a holding that the system remained unconstitutional).

## II. THE EDUCATION DUTY

In education, we speak often of constitutional rights and seldom of constitutional duties.<sup>52</sup> The "right to education" is frequently held up as an exemplar of a positive constitutional right created by state constitutions, and cases purporting to adjudicate education rights claims are held up as examples that positive constitutional rights are enforceable and subject to effective judicial remediation.<sup>53</sup> The consequences of this rights-focused approach have been to improperly focus state judiciaries on the substantive results of legislative enactments, rather than on the legislative process, and this substantive focus has led some courts to overreach their institutional boundaries and other courts to abdicate their judicial role.

The discussion below evaluates state judicial approaches to the enforcement of state constitutional education clauses in light of text, along with the history and political theory underlying state constitutionalism. I conclude from this review that state courts have both overenforced and underenforced the norms expressed in the affirmative duty provisions of their constitutions,<sup>54</sup> and that recognizing the nature of legislative duty as a fiduciary duty will guide these courts to more fruitful adjudicatory approaches. I begin with state constitutional text.

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52. See, e.g., *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 212 (Ky. 1989) ("A child's right to an adequate education is a fundamental one under our Constitution. The General Assembly must protect and advance that right.").

53. See, e.g., Hershkoff, *supra* note 2, at 1186 (supporting the argument that positive state constitutional welfare rights should be enforceable and explaining that positive education rights had been enforced effectively in the American states under state constitutions); Neuborne, *supra* note 49, at 887; Tractenberg, *supra* note 49, at 888.

54. The theory of "under-enforced constitutional norms," described as constitutional principles that, for reasons such as justiciability, escape full judicial enforcement, comes from Lawrence Sager's seminal article on the topic. Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1213-20 (1978). Contemporaneously, Henry Monaghan developed the related idea of "over-enforced" constitutional norms, such as those constitutional principles which the courts develop as prophylactics, e.g., the *Miranda* rule, requiring or forbidding more of the government than a constitution's underlying mandates require or permit. Henry P. Monaghan, *The Supreme Court, 1974 Term-Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 2-3 (1975).

## A. State Constitutional Education Clauses

### 1. Education Clauses and Education Rights

Every state constitution imposes upon the state legislature some obligation to provide for an education system.<sup>55</sup> State constitutional education clauses often contain qualitative terms, such as “thorough,”<sup>56</sup> “efficient,”<sup>57</sup> “suitable,”<sup>58</sup> and “adequate,”<sup>59</sup> that describe the legislature’s duty to provide for an education system. In addition, education clauses uniformly state their terms affirmatively, and most often as mandatory directives rather than as admonitory encouragements. For example, the Minnesota Constitution provides, “[I]t is the duty of the legislature to establish a general and uniform system of public schools.”<sup>60</sup> Most of the other state education clause provisions take similar forms, using duty-based terms such as “shall” to impose obligations and directing these terms toward the establishment and maintenance of a system of schools.<sup>61</sup>

Not all state constitutions contain unambiguously mandatory language, however. Several state constitutions employ mandatory terms, such as “shall,” but direct such terms to hortatory goals. For example, the California Constitution provides, “A general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the Legislature shall encourage by all suitable means the promotion of intellectual,

55. R. CRAIG WOOD, EDUCATIONAL FINANCE LAW: CONSTITUTIONAL CHALLENGES TO STATE AID PLANS—AN ANALYSIS OF STRATEGIES 103–08 (3d ed. 2007) (listing the education clauses of the fifty states).

56. N.J. CONST. art. VIII, § IV, ¶ 1.

57. KY. CONST. § 186.

58. KAN. CONST. art. VI, § 6(b).

59. GA. CONST. art. VIII, § 1, ¶ 1.

60. MINN. CONST. art. XIII, § 1.

61. ALASKA CONST. art. VII, § 1; ARIZ. CONST. art. XI, § 6; ARK. CONST. art. XIV, § 1; COLO. CONST. art. IX, § 2; CONN. CONST. art. VIII, § 1; DEL. CONST. art. X, § 1; FLA. CONST. art. IX, § 1(a); GA. CONST. art. VIII, § 1; HAW. CONST. art. X, § 1; IDAHO CONST. art. IX, § 1; ILL. CONST. art. X, § 1; IND. CONST. art. IX, § 1; KAN. CONST. art. VI, § 1; KY. CONST. § 183; LA. CONST. art. VIII, § 1; ME. CONST. art. VIII, pt. 1 § 1; MD. CONST. art. VIII, § 1; MASS. CONST. pt. 1, ch. V, § II; MICH. CONST. art. VIII, §§ 1–2; MINN. CONST. art. XIII, § 1; MISS. CONST. art. VIII, § 201; MO. CONST. art. IX, § 1(a); MONT. CONST. art. X, § 1; NEB. CONST. art. VII, § 1; NEV. CONST. art. XI, § 2; N.J. CONST. art. VIII, § IV, ¶ 1; N.M. CONST. art. XII, § 1; N.Y. CONST. art. XI, § 1; N.C. CONST. art. IX, § 2; N.D. CONST. art. VIII, §§ 1, 3, 4; OHIO CONST. art. VI, § 2; OKLA. CONST. art. XIII, § 1; OR. CONST. art. VIII, §§ 3, 8(1); PA. CONST. art. III, § 14; R.I. CONST. art. XII, § 1; S.D. CONST. art. VIII, § 1; TENN. CONST. art. XI, § 12; TEX. CONST. art. VII, § 1; UTAH CONST. art. X, § 1; VA. CONST. art. VIII, § 1; WASH. CONST. art. IX, §§ 1–2; W. VA. CONST. art. XII, §§ 1, 12; WIS. CONST. art. X, § 3. For the complete text of each state’s education clause, see WOOD, *supra* note 55, at 103–08.



scientific, moral, and agricultural improvement.”<sup>62</sup> Iowa’s education clause contains similar language,<sup>63</sup> as do the education clauses of Nevada<sup>64</sup> and New Hampshire.<sup>65</sup> Other state constitutions contain a kind of patent ambiguity in their provisions. For example, in its Education Article, North Carolina’s constitution contains an admonition that education “shall forever be encouraged,”<sup>66</sup> followed by a mandatory requirement for the establishment of a “general and uniform system of free public schools, which shall be maintained at least nine months in every year, and wherein equal opportunities shall be provided for all students.”<sup>67</sup> But the Declaration of Rights of the same constitution unambiguously establishes an individual “right to the privilege of education,” followed by a state duty to “guard and maintain that right.”<sup>68</sup> Similarly, Wyoming’s constitution provides an admonition that a right to education “should have practical recognition,” followed by a mandatory legislative duty to “encourage means and agencies calculated to advance the sciences and liberal arts.”<sup>69</sup>

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62. CAL. CONST. art. IX, § 1. Note that the California Constitution also has a more directive provision mandating the maintenance of a public school in each district for at least six months of each year. *Id.* § 5. This latter provision has not figured prominently in any school finance case yet.

63. IOWA CONST. art. IX, 2d, § 3 (“The general assembly shall encourage, by all suitable means, the promotion of intellectual, scientific, moral, and agricultural improvement.”).

64. NEV. CONST. art. XI, § 1 (“The legislature shall encourage by all suitable means the promotion of intellectual, literary, scientific, mining, mechanical, agricultural, and moral improvements, and also provide for a superintendent of public instruction and by law prescribe the manner of appointment, term of office and the duties thereof.”).

65. N.H. CONST. pt. 2d, art. 83 (“Knowledge and learning, generally diffused through a community, being essential to the preservation of a free government; and spreading the opportunities and advantages of education through the various parts of the country, being highly conducive to promote this end; it shall be the duty of the legislators and magistrates, in all future periods of this government, to cherish the interest of literature and the sciences, and all seminaries and public schools, to encourage private and public institutions, rewards, and immunities for the promotion of agriculture, arts, sciences, commerce, trades, manufactures, and natural history of the country; to countenance and inculcate the principles of humanity and general benevolence, public and private charity, industry and economy, honesty and punctuality, sincerity, sobriety, and all social affections, and generous sentiments, among the people . . .”).

66. N.C. CONST. art. IX, § 1 (“Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools, libraries, and the means of education shall forever be encouraged.”).

67. *Id.* § 2 (“The General Assembly shall provide by taxation and otherwise for a general and uniform system of free public schools, which shall be maintained at least nine months in every year, and wherein equal opportunities shall be provided for all students.”).

68. *Id.* art. I, § 15.

69. WYO. CONST. art. I, § 23 (“The right of the citizens to opportunities for education should have practical recognition. The legislature shall suitably

Vermont's education clause does not contain any mandatory terms at all. It provides, "Laws for the encouragement of virtue and prevention of vice and immorality ought to be constantly kept in force, and duly executed; and a competent number of schools ought to be maintained in each town unless the general assembly permits other provisions for the convenient instruction of youth."<sup>70</sup> This provision has the feel of a completely optional encouragement, but it might nevertheless be read as mandatory because of the existence of the "unless" clause, which suggests that the admonitory goals must be pursued in the absence of alternative legislative action of a similar character. Alabama's education clause is even more explicit in denying any compulsion for legislative action, stating:

It is the policy of the state of Alabama to foster and promote the education of its citizens in a manner and extent consistent with its available resources, and the willingness and ability of the individual student, but nothing in this Constitution shall be construed as creating or recognizing any right to education or training at public expense, nor as limiting the authority and duty of the legislature, in furthering or providing for education, to require or impose conditions or procedures deemed necessary to the preservation of peace and order.<sup>71</sup>

However, this language was added to Alabama's constitution right after *Brown v. Board of Education*<sup>72</sup> was decided, and it is followed by language explicitly authorizing segregated schooling.<sup>73</sup> One trial court in Alabama has held that, due to its racist purpose, the education clause as amended following *Brown* may not be applied and that the original education clause found in the pre-*Brown* version of the state constitution, which contains squarely mandatory language,<sup>74</sup> must be applied instead.<sup>75</sup>

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encourage means and agencies calculated to advance the sciences and liberal arts.").

70. VT. CONST. ch. II, § 68.

71. ALA. CONST. art. XIV, § 256.

72. 347 U.S. 483 (1954).

73. ALA. CONST. art. XIV, § 256 ("To avoid confusion and disorder and to promote effective and economical planning for education, the legislature may authorize the parents or guardians of minors, who desire that such minors shall attend schools provided for their own race, to make election to that end, such election to be effective for such period and to such extent as the legislature may provide.").

74. ALA. CONST. of 1901, art. XIV, § 256 ("The legislature shall establish, organize, and maintain a liberal system of public schools throughout the state for the benefit of the children thereof between the ages of seven and twenty-one years.").

75. See Op. of the Justices, 624 So. 2d 107, 147 (Ala. 1993) (reproducing a trial court opinion in an advisory opinion of the state supreme court recognizing a prior declaration of unconstitutionality by the trial judge based on the racist origins of the amendment). As this issue was never appealed to the Supreme

Many observers have argued that these provisions create positive individual rights to educational services.<sup>76</sup> However, the overwhelming majority of state constitutions direct their affirmative duty or goal statements at the legislature or the state, with no mention at all of individuals.<sup>77</sup> Still, numerous scholars and many state supreme courts have taken the existence of these affirmative provisions as establishing a judicially enforceable individual positive right to education in each state.<sup>78</sup> Few have questioned whether the duty to provide education might exist independently of an individual right to receive it.<sup>79</sup>

Professors Steven Calabresi and Sarah Agudo come the closest to a full examination of whether education deserves the status of an individual "right" under state constitutions.<sup>80</sup> Employing a jural correlativity analysis,<sup>81</sup> the authors conclude that, given the

Court of Alabama, it is unclear whether all of the amended language, just the explicitly race-neutral language, or none of the amended language is operative.

76. See, e.g., Jonathan Feldman, *Separation of Powers and Judicial Review of Positive Rights Claims: The Role of State Courts in an Era of Positive Government*, 24 RUTGERS L.J. 1057, 1077 (1993); Hershkoff, *supra* note 2, at 1168; Neuborne, *supra* note 49; Rebell, *supra* note 49, at 1505–10.

77. But see N.M. CONST. art. XII, § 5 ("Every child of school age and of sufficient physical and mental ability shall be required to attend a public or other school during such period and for such time as may be prescribed by law."); N.C. CONST. art. I, § 15 ("The people have a right to the privilege of education, and it is the duty of the State to guard and maintain that right."); *Id.* art. IX, § 3 ("The General Assembly shall provide that every child of appropriate age and of sufficient mental and physical ability shall attend the public schools, unless educated by other means."); OKLA. CONST. art. XIII, § 4 ("The Legislature shall provide for the compulsory attendance at some public or other school, unless other means of education are provided, of all the children in the State who are sound in mind and body . . ."); WYO. CONST. art. I, § 23 ("The right of the citizens to opportunities for education should have practical recognition.").

78. See Hershkoff, *supra* note 2, at 1168; Helen Hershkoff, *State Courts and the "Passive Virtues": Rethinking the Judicial Function*, 114 HARV. L. REV. 1833, 1839 (2001) [hereinafter Hershkoff, *Passive Virtues*]; Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1015, 1022–28 (2004); James S. Liebman & Charles F. Sabel, *A Public Laboratory Dewey Barely Imagined: The Emerging Model of School Governance and Legal Reform*, 28 N.Y.U. REV. L. & SOC. CHANGE 183, 278–83 (2003); Rebell, *supra* note 49, at 1526–29. Hershkoff's influential work has defended state constitution-based institutional reform litigation as uniquely legitimate due to the structural features of state government and the unique, positive character of state constitutional rights to education and social welfare. Hershkoff, *supra* note 2, at 1168.

79. For one recent article on the side of more skepticism toward the value of individual rights to reform, see generally Darby & Levy, *supra* note 3.

80. Calabresi & Agudo, *supra* note 32, at 108–09.

81. The idea that rights and duties are correlative, such that, where one exists, the other does as well, is most closely associated with the scholarship of Wesley Newcomb Hohfeld. See Bauries, *supra* note 3, at 306–16 (reviewing the jural correlativity theory as expressed in Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L.J.

ubiquity of affirmative duty provisions among state constitutions at the time of the adoption of the Fourteenth Amendment, the conclusion that education is a right “deeply rooted in American history and tradition,” and is thus a “fundamental right,” is almost inevitable.<sup>82</sup> Specifically, in discussing *Prigg v. Pennsylvania*,<sup>83</sup> the authors state, “Thus, Justice Story’s opinion stood for the proposition that an individual right can give rise to government power, which is far more tenuous than our claim that a government duty to educate implies an individual right to be educated at public expense.”<sup>84</sup> Of course, as an analysis of the availability of a substantive due process right to education in federal court, Calabresi and Agudo’s analysis does not squarely address the more direct question of whether the state constitutional provisions they rely on create *state* constitutional rights, but it goes a good distance in that direction. Only one state court, the Supreme Court of Washington, has taken the correlativity analysis this far and has specifically concluded that an individual positive right to education exists under the state constitution.<sup>85</sup> However, many other state courts have at least stated that such rights are created by educational duty provisions, either as “fundamental rights” in the equal protection context (as Calabresi and Agudo did) or as free-standing individual positive rights in the adequacy context.<sup>86</sup>

Counterbalancing these favorable treatments of the question of education rights under state constitutions are few, but powerful, rejoinders based in textualist and original intent analysis. Professor John Eastman’s work over the past decade establishes the proposition that no individual rights to education existed under state constitutions until very recently.<sup>87</sup> Eastman’s work is based on the textual features of the education clauses of state constitutions

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710, 710, 717 (1917), and Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 28–59 (1913)). Hohfeld’s theory of correlativity has rarely been employed in constitutional analysis. See generally Allen Thomas O’Rourke, *Refuge from a Jurisprudence of Doubt: Hohfeldian Analysis of Constitutional Law*, 61 S.C. L. REV. 141 (2009). Calabresi and Agudo do not cite Hohfeld specifically to support their case, but the idea of correlativity underlies their analysis.

82. Calabresi & Agudo, *supra* note 32, at 108–09.

83. 41 U.S. 539 (1842).

84. Calabresi & Agudo, *supra* note 32, at 108.

85. Seattle Sch. Dist. No. 1 v. State, 585 P.2d 71, 86–87 (Wash. 1978).

86. E.g., Rose v. Council for Better Educ., Inc., 790 S.W.2d 186, 201 (Ky. 1989); Helena Elementary Sch. Dist. No. 1 v. State, 769 P.2d 684, 690–91 (Mont. 1989), *amended by* 784 P.2d 412, 413 (Mont. 1990).

87. John C. Eastman, *When Did Education Become a Civil Right? An Assessment of State Constitutional Provisions for Education, 1776-1900*, 42 AM. J. LEGAL HIST. 1, 2 (1998).

and judicial interpretations of these textual features.<sup>88</sup> Eastman demonstrates that, through much of history, the education clauses of state constitutions were stated in hortatory, rather than mandatory, terms.<sup>89</sup> Only since the Civil War have more mandatory provisions become common, and only since the late 1960s have even these provisions been construed in the courts as establishing individual rights—typically the “fundamental rights” familiar to federal equal protection jurisprudence.<sup>90</sup>

Professor Jon Dinan provides originalist support for Eastman’s conclusions through his careful and comprehensive review of the available convention debates for the best evidence of state constitutional framers’ intent in adopting education provisions.<sup>91</sup> Dinan’s analysis leaves very little room for one to conclude that such provisions were intended by their drafters and adopters to be judicially enforced by individual rights holders.<sup>92</sup> As Dinan points out, rather than seeking to establish judicially enforceable provisions, the vast majority of state constitutional drafters appear to have worked to *prevent* the substantive components of their proposed provisions (e.g., requirements for “adequacy,”

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88. See *id.* See generally John C. Eastman, *Reinterpreting the Education Clauses in State Constitutions* in *SCHOOL MONEY TRIALS: THE LEGAL PURSUIT OF EDUCATIONAL ADEQUACY* 55 (Martin R. West & Paul E. Peterson, eds. 2007).

89. Eastman, *supra* note 87, at 3–8.

90. *Id.* at 2, 31. As Eastman points out, in two states, Montana and North Carolina, the text of the state constitution provides explicitly for individual rights in education. However, as Professor John Dinan explains, the Montana provision merely guarantees individual equality in educational services. John Dinan, *The Meaning of State Constitutional Education Clauses: Evidence from the Constitutional Convention Debates*, 70 ALB. L. REV. 927, 970 (2007).

91. Dinan, *supra* note 90, at 929–32.

92. *Id.* at 979. Dinan recognizes and acknowledges the likely critiques of his originalist approach. As Dinan states, the evidence he considers comes only out of debates during state constitutional conventions and does not include debates over proposed amendments to existing state constitutions. Also, roughly half of the convention debates that have occurred over time either were not memorialized or the records do not exist today. *Id.* at 979–81. While these limitations in Dinan’s data certainly counsel a cautious approach in interpreting his findings, he certainly makes out at least a *prima facie* case on originalist terms that no state constitutional drafters intended to make the substantive provisions in state education clauses judicially enforceable and that only one state’s (Montana’s) drafters sought to render an equality provision. See *id.* at 979. A possible counterpoint to Dinan’s analysis comes out of the history of Florida’s constitutional revision in 1998. One of the members of the Revision Commission convened in that year, which resulted in an amendment to the state constitution’s education clause, claims that the revision was adopted with the express goal of making the clause enforceable in the courts. See Jon Mills & Timothy McLendon, *Setting a New Standard for Public Education: Revision 6 Increases the Duty of the State to Make “Adequate Provision” for Florida Schools*, 52 FLA. L. REV. 329, 366 (2000).

“thoroughness,” “efficiency,” “sufficiency,” etc.) from becoming judicially enforceable.<sup>93</sup>

Taken together, the work of these two scholars makes a strong case for categorically rejecting the recent move in the state courts to enforce the qualitative provisions in state constitutional education clauses as substantive rights provisions. Nevertheless, it is possible, surveying the provisions extant in state constitutions today for not only text but also structure and underlying political theory, to come to a more nuanced conclusion—one that recognizes the difference between specific substantive requirements and general substantive goals, either or both of which may potentially form aspects of a legislative duty to legislate.

As outlined above, the provisions in today’s state constitutions are overwhelmingly worded in mandatory terms, such as “duty” and “shall.” While such provisions (with the single exception of North Carolina’s) do not explicitly establish individual positive rights, they certainly purport to establish affirmative legislative duties, and these duties may be judicially enforceable. It is a familiar interpretive principle that, where a legal text is clear and unambiguous, a court should not delve beneath such text to derive the intent of its drafters.<sup>94</sup> Though they may be vague as to the content of the duty, the mandatory provisions are certainly clear at least in establishing a legislative duty to provide for education. Even the hortatory education clauses at least admonish the states to take education seriously in determining how to prioritize state appropriations and policy determinations,<sup>95</sup> and such admonishments might themselves be judicially enforceable, were a principled theory to undergird such enforcement.<sup>96</sup>

In any event, the provisions exist and will continue to generate judicial interpretations. Thus, it behooves the scholarly community to assist with the proper conceptualization of both the mandatory and admonitory provisions.

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93. Dinan, *supra* note 90, at 967–68.

94. See, e.g., Comm. to Recall Robert Menendez from the Office of U.S. Senator v. Wells, 7 A.3d 720, 735 (N.J. 2010) (quoting *State v. Trump Hotels & Casino Resorts, Inc.*, 734 A.2d 1160 (N.J. 1999)) (“Our analysis begins with the plain language of the Federal Constitution. ‘If the language is clear and unambiguous, the words used must be given their plain meaning.’”).

95. See Dinan, *supra* note 90, at 946 (relating comments of some conventioners that adoptions of admonitory provisions were directed at signaling the importance of education).

96. At least one state constitutional scholar uses the word “admonitory” to describe similar provisions. See BERNARD SCHWARTZ, *THE GREAT RIGHTS OF MANKIND: A HISTORY OF THE AMERICAN BILL OF RIGHTS* 53–54, 85–86, 90–91 (1977) (reviewing the declarations of rights in several early state constitutions and criticizing the “admonitory” nature of the particular provisions drafted for the Virginia Constitution by George Mason, a non-lawyer).

## 2. *The Challenges of Enforcement and Remediation*

I now turn to the judicial interpretation and enforcement of these state constitutional provisions. I briefly review the path that brought these provisions into the state courts for review, and I show that the approaches that state courts have taken in the existing cases overlook the character of the duties they purport to enforce and ultimately devalue the idea of an individual right to education.

Education finance litigation involves constitutional challenges to state education funding systems, where the ultimate goal is an increase or reallocation of statewide education funding. The conventional account of this litigation holds that it has proceeded through three “waves” of reform.<sup>97</sup> Recently, this “wave” metaphor has drawn scholarly criticism.<sup>98</sup> However, if one avoids the common flaw of assuming a clear line of demarcation between each wave and accepts that each case may draw from theories dominant in one or more waves alternatively, then the metaphor remains useful as an explanatory tool.

Under this metaphor, the first wave involved challenges brought in federal and state courts based on the Equal Protection Clause of the Fourteenth Amendment. School finance litigation, as currently conceived, is the progeny of the decades-long development of institutional reform litigation in the federal courts.<sup>99</sup> As Professor

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97. William E. Thro, *Judicial Analysis During the Third Wave of School Finance Litigation: The Massachusetts Decision as a Model*, 35 B.C. L. REV. 597, 600–04 (1994) [hereinafter Thro, *Judicial Analysis*] (explaining the “waves” metaphor); William E. Thro, *A New Approach to State Constitutional Analysis in School Finance Litigation*, 14 J.L. & POL. 525, 529–30 n.14 (1998) (outlining the “waves” metaphor). See generally Michael Heise, *State Constitutions, School Finance Litigation, and the “Third Wave”: From Equity to Adequacy*, 68 TEMP. L. REV. 1151 (1995) (adopting the “wave” metaphor).

98. See William S. Koski, *Of Fuzzy Standards and Institutional Constraints: A Re-examination of the Jurisprudential History of Educational Finance Reform Litigation*, 43 SANTA CLARA L. REV. 1185, 1283–96 (2003) (explaining that no clear line divides equality theories from adequacy theories and that, in fact, both theories are present in most education finance cases); James E. Ryan, *Standards, Testing, and School Finance Litigation*, 86 TEX. L. REV. 1223, 1237 (2008) (calling into doubt the distinctions made between the second and third “waves”); *id.* at 1229 n.35 (citing Richard Briffault, *Adding Adequacy to Equity*, in SCHOOL MONEY TRIALS: THE LEGAL PURSUIT OF EDUCATIONAL ADEQUACY 25, 25–27 (2007)); see also William S. Koski & Rob Reich, *When “Adequate” Isn’t: The Retreat from Equity in Educational Law and Policy and Why It Matters*, 56 EMORY L.J. 545, 548 (2006) (making the prescriptive case for returning to equity as the dominant theory).

99. Owen M. Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 2 (1979). Other common terms for the claims that “institutional reform litigation” describes are “public law litigation,” “structural reform litigation,” and “institutional litigation.” See Susan P. Sturm, *A Normative Theory of Public Law Remedies*, 79 GEO. L.J. 1355, 1357 n.1 (1991); see also, e.g., Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1284, 1288–89 (1976) (“public law litigation”); Theodore Eisenberg & Stephen C.

Owen Fiss pointed out years ago,<sup>100</sup> institutional reform litigation began in earnest<sup>101</sup> with the seminal education rights case *Brown v. Board of Education*.<sup>102</sup> As Professor Abram Chayes explained in his article on the topic, the judge in institutional reform litigation does not so much adjudicate the case as manage it.<sup>103</sup> Although courts do issue their own injunctions, an institutional reform claim most often results in a negotiated settlement agreement, which the court formalizes into a consent decree—a device that effectively orders performance of the settlement agreement—thus converting any breach of the agreement into a potential contempt of court.<sup>104</sup> In such cases, the judge either assumes monitoring of the compliance with the injunction directly or appoints a special master to handle the monitoring on the ground. This monitoring can extend for years or even decades.<sup>105</sup> Out of the resistance to *Brown*, the form developed as federal judges issued injunctive remedial orders or consent decrees binding local school districts and other public entities to achieve long-term, structural changes to remedy widespread past harms with persistent present effects.<sup>106</sup>

Once these large-scale desegregation orders gained acceptance, reformers turned their eyes toward arguments based on socioeconomic equality, pressing claims in federal court relying on the Equal Protection Clause that education was a fundamental right and wealth was a suspect classification, and hoping that courts would apply strict scrutiny to state educational finance schemes.<sup>107</sup> The Supreme Court closed the federal door on these types of

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Yeazell, *The Ordinary and the Extraordinary in Institutional Litigation*, 93 HARV. L. REV. 465, 466 (1980) (“institutional litigation”); Fiss, *supra*, at 2 (“structural reform litigation”); Margo Schlanger, *Beyond the Hero Judge: Institutional Reform Litigation as Litigation*, 97 MICH. L. REV. 1994, 1995 (1999) (“institutional reform litigation”). I favor and use “institutional reform litigation” because it is the most descriptively accurate, as this litigation’s chief distinguishing feature is its goal to cause the reorganization of public institutions, rather than to secure compensation for particular plaintiffs. See *supra* note 78 and accompanying text.

100. Fiss, *supra* note 99, at 2.

101. Usman, *supra* note 5, at 1468 (citing Michael Heise, *Litigated Learning, Law’s Limits, and Urban School Reform Challenges*, 85 N.C. L. REV. 1419, 1438–39 (2007)) (“While education related litigation was not unknown prior to *Brown*, the Supreme Court’s watershed decision generated a substantial increase therein.”).

102. 347 U.S. 483 (1954).

103. See Chayes, *supra* note 99, at 1300–02 (describing the processes involved in fashioning public law remedies).

104. Sturm, *supra* note 99, at 1446.

105. Ross Sandler & David Schoenbrod, *The Supreme Court, Democracy and Institutional Reform Litigation*, 49 N.Y.L. SCH. L. REV. 915, 916 (2005).

106. See Fiss, *supra* note 99, at 2–3; Michael Heise, *Litigated Learning, Law’s Limits, and Urban School Reform Challenges*, 85 N.C. L. REV. 1419, 1438–39 (2007); Schlanger, *supra* note 99, at 1994–95.

107. See WOOD, *supra* note 55, at 82–85 (discussing the first wave).



challenges in *San Antonio Independent School District v. Rodriguez*,<sup>108</sup> holding that education is not a federal fundamental right,<sup>109</sup> and wealth is not a suspect classification for the purposes of analysis under the Equal Protection Clause.<sup>110</sup> Relying on these holdings, the Supreme Court in *Rodriguez* applied rational basis review and upheld Texas's school finance system, despite broad inequalities in funding, based on what the Court determined to be the legitimate governmental objective of preserving local control over educational decision making.<sup>111</sup>

The denial of strict scrutiny review of educational funding inequalities in federal courts had the immediate effect of directing all education finance litigation to state courts; this litigation was pursued in a second wave of reform, involving primarily equity-based challenges based on the equal protection or uniformity provisions of state constitutions.<sup>112</sup> These challenges were designed similarly to the federal institutional reform litigation that spawned *Rodriguez*, with large plaintiff groups seeking broad structural injunctions to equalizing funding.<sup>113</sup> These "second wave" challenges met with varying levels of success, typically depending on whether education was found to have the status of a fundamental right in the state—the same determination that was ultimately dispositive in *Rodriguez*.<sup>114</sup> Ultimately, however, litigants generally migrated away from the equality-based strategy in favor of a new strategy: suits based on the absolute inadequacy of education spending.<sup>115</sup> These challenges make up the "third wave" of

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108. 411 U.S. 1 (1973).

109. *Id.* at 37.

110. *Id.* at 28–29.

111. *Id.* at 55.

112. Thro, *Judicial Analysis*, *supra* note 97, at 601–03.

113. See Sonja Ralston Elder, *Enforcing Public Educational Rights via a Private Right of Action*, 1 DUKE F. L. & SOC. CHANGE 137, 143–44 (2009) (noting that of the cases filed by 2009, "[i]n more than 80 percent of these cases, a school district or nonprofit organization was a named plaintiff. In the remaining eight cases in which all plaintiffs were individual students, the suits were filed as or treated as class actions rather than individual suits.").

114. See WOOD, *supra* note 55, at 69–70 (outlining the history of the "equity" wave).

115. Thro, *Judicial Analysis*, *supra* note 97, at 603–04. Many explanations exist for this migration, among them that the issues surrounding determinations of equality and equity became too complex for courts and the public to accept, that urban districts did not see many benefits in equity litigation, and that the pervasive influence of "local control" impaired the goals of plaintiffs. See Michael Heise, *Equal Educational Opportunity, Hollow Victories, and the Demise of School Finance Equity Theory: An Empirical Perspective and Alternative Explanation*, 32 GA. L. REV. 543, 579–85 (1998) (explaining these theories and introducing the alternative explanation that remedies did not have their desired effects of centralization of and increases in spending).

litigation-based reform, and adequacy-based theories currently remain dominant in education finance reform litigation.<sup>116</sup>

Adequacy-based challenges ask state courts to interpret and enforce the quality terms of a state constitution's education clause. Along with the duty-based language discussed above, each state's education clause may contain one or more terms of quality that describe the goals of the legislative duty, such as "thorough,"<sup>117</sup> "efficient,"<sup>118</sup> "suitable,"<sup>119</sup> "adequate,"<sup>120</sup> and "high quality."<sup>121</sup> The most difficult aspect of an adequacy claim is therefore the inherent indeterminacy in the language used to frame each state's command. Empirical studies have repeatedly been unable to document any influence that differences in the quality terms that exist in state constitutional education clauses have on the results of adequacy cases.<sup>122</sup> States with comparatively weak-sounding education clause language—such as Kentucky<sup>123</sup>—have generated judicial decisions invalidating the entire state educational system,<sup>124</sup> while states with comparatively strong-sounding language—such as Illinois<sup>125</sup>—have

116. As several scholars have pointed out, equity theories have not disappeared from education finance litigation. See *supra* note 98. In fact, in some cases, equity remains the dominant theory, and at least one scholar has determined that, even in purported "adequacy" cases, the adjudication of the claims amounts to evaluating inequalities. Ryan, *supra* note 98, at 1225. Nevertheless, this third "wave" remains distinct from prior reform periods because inadequacy was not pressed by litigants as a dominant theory of relief during these prior periods.

117. N.J. CONST. art. VIII, § IV, ¶ 1.

118. KY. CONST. § 186.

119. KAN. CONST. art. VI, § 6(b).

120. GA. CONST. art. VIII, § 1, ¶ 1.

121. ILL. CONST. art. X, § 1.

122. See generally Paula J. Lundberg, *State Courts and School Funding: A Fifty-State Analysis*, 63 ALB. L. REV. 1101 (2000) (finding no significant relationship between education clause language, defined by the category approach, and case outcomes); Karen Swenson, *School Finance Reform Litigation: Why Are Some State Supreme Courts Activist and Others Restrained?*, 63 ALB. L. REV. 1147 (2000) (revealing no significant relationship between language and case outcomes); Yohance C. Edwards & Jennifer Ahern, Note, *Unequal Treatment in State Supreme Courts: Minority and City Schools in Education Finance Reform Litigation*, 79 N.Y.U. L. REV. 326 (2004) (reaching similar conclusions). But see Bill Swinford, *A Predictive Model of Decision Making in State Supreme Courts: The School Financing Cases*, 19 AM. POL. RES. 336, 347 (1991) (finding a weak relationship, but only as to equality-based cases).

123. See KY. CONST. § 186 (requiring the establishment of "an efficient system of common schools").

124. See *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 212 (Ky. 1989) (interpreting "efficient" to require a system that follows nine aspirational principles, one of which encompasses seven specific learning goals).

125. See ILL. CONST. art. X, § 1 ("A fundamental goal of the People of the State is the educational development of all persons to the limits of their capacities. The State shall provide for an efficient system of high quality public educational institutions and services.").

generated judicial decisions rejecting the very idea of a judicial role in enforcing education clause language.<sup>126</sup> Moreover, courts choosing to engage the education clause substantively, as the Supreme Court of Kentucky did, tend to reach for lofty-sounding, but often unrealistic, starkly countertextual, and even ahistorical, interpretations of the constitutional language.<sup>127</sup> Education policy claims are particularly susceptible to this danger, as few judges likely relish the idea of publishing an opinion minimizing the importance of education or the legislature's responsibility for it.

Given both the indeterminacy in constitutional language and the understandable tendency to reach for lofty and aspirational standards, approaching the education clause substantively gives rise to a significant concern—whether a state court may, consistent with the separation of powers, mandamus or otherwise enjoin a legislature to raise or allocate additional revenue for the state's education system where the court sees current funding levels as not “thorough,” “efficient,” “suitable,” “adequate,” or “high quality.”<sup>128</sup>

Facing this concern, courts have taken one of three paths.<sup>129</sup> About a third of courts have dismissed cases asking for such enforcement on grounds of non-justiciability, concluding that, because affirmative duty provisions are directed at state legislatures and because their terms are so subjective, these legislatures are vested with complete and unreviewable discretion.<sup>130</sup> Another third or so have engaged the merits of the claims and chosen either a deferential form of review—such as the federal “rational basis” test, upholding the legislation against the challenge<sup>131</sup>—or a non-deferential form of review, construing the education clause as an

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126. See *Comm. for Educ. Rights v. Edgar*, 672 N.E.2d 1178, 1191 (Ill. 1996) (rejecting a challenge based on the “high quality” term as a nonjusticiable political question).

127. See, e.g., William E. Thro, *A New Approach to State Constitutional Analysis in School Finance Litigation*, 14 J.L. & POL. 525, 548 (1998) (“If [the Supreme Court of Kentucky’s] standard is taken literally, there is not a public school system in America that meets it.”).

128. See generally Joshua Dunn & Martha Derthick, *Adequacy Litigation and the Separation of Powers*, in *SCHOOL MONEY TRIALS: THE LEGAL PURSUIT OF EDUCATIONAL ADEQUACY* 322 (Martin R. West & Paul E. Peterson eds., 2007) (explaining the salience of separation of powers concerns to system-wide adequacy claims).

129. Scott R. Bauries, *Is There an Elephant in the Room?: Judicial Review of Educational Adequacy and the Separation of Powers in State Constitutions*, 61 ALA. L. REV. 701, 721–34 (2010) (outlining these three approaches and their scholarly defenders); Larry J. Obhof, *Rethinking Judicial Activism and Restraint in State School Finance Litigation*, 27 HARV. J.L. & PUB. POL’Y 569, 572–73 (2004) (explaining the approaches).

130. Bauries, *supra* note 3, at 340–42 (2011) (discussing this approach among state courts).

131. *Id.* at 333–34 (discussing these cases, each of which adopts a legislative definition of adequacy in formulating its own definition of the constitutional standard).

absolute command to create an “adequate” system of schools (or some variant of the term). These courts ultimately hold against the state and use that holding as a justification for a public law injunction to legislate the system into constitutionally valid status.<sup>132</sup> A final third have engaged in review of the merits of such cases, applied a non-deferential form of review, and found the state constitution violated, only to step back at that stage and deny the plaintiffs any sort of directive remedial order against the legislature.<sup>133</sup>

Proponents of this third way tout its ability to engage state legislatures and the judiciary in an ongoing “dialogue” as to the meaning of the state constitution.<sup>134</sup> Proponents favor the dialogic approach because it ostensibly allows the courts to engage in a collaboration with the coordinate branches of government, and therefore mitigates separation of powers problems resulting from interbranch conflicts.<sup>135</sup>

Recently, Professors Charles Sabel and William Simon offered a thoughtful defense and reconceptualization of the dialogic, or what the authors term the “experimentalist,” model.<sup>136</sup> Sabel and Simon argue, in part, that institutional reform litigation<sup>137</sup> in state courts under state education clauses succeeds because courts have abandoned the traditional model of institutional reform in these cases.<sup>138</sup> Professors Sabel and Simon further argue that in the successful institutional reform cases, including, prominently, state court education clause litigation, courts do not perform a directive monitoring role.<sup>139</sup> Rather, courts in these cases issue orders setting substantive goals and then step back and allow for the parties to

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132. *Id.* at 334–40 (discussing the cases which have resulted in both nondeferential merits adjudication and policy-directive remediation).

133. *Id.* at 342–46 (discussing the cases which have resulted in nondeferential merits adjudication, but no court-directed remediation). The most common remedy is a nondirective declaration of unconstitutionality. *Id.*

134. See George D. Brown, *Binding Advisory Opinions: A Federal Courts Perspective on the State School Finance Decisions*, 35 B.C. L. REV. 543, 546 (1994) (advocating an active dialogic approach as a means to allow review); Larry J. Obhof, *Rethinking Judicial Activism and Restraint in School Finance Litigation*, 27 HARV. J.L. & PUB. POL’Y 569, 593–94, 598–600 (2004) (arguing in favor of a “middle ground” approach, which would require total remedial abstention—or passive dialogue—as a means to allow review without trampling on the separation of powers). Other terms are used interchangeably with “dialogue.” See Rebell, *supra* note 49 at 1539–42 (utilizing the term “colloquy”).

135. See Sturm, *supra* note 99, at 1365–76 (presenting the “consensual deliberation” approach, which is the progenitor of the dialogic approach in education finance litigation).

136. Sabel & Simon, *supra* note 78, at 1067–73, 1082–1100.

137. See *supra* note 99 and accompanying text.

138. Sabel & Simon, *supra* note 78, at 1022–28.

139. *Id.* at 1025–26.

experiment with different strategies for achieving these goals.<sup>140</sup> This process of experimentation results in the formation of what Sabel and Simon term “new publics” made of interested stakeholders both within and outside the party structure of the case.<sup>141</sup> These “new publics” stand as alternatives to the “control groups” that ordinarily materialized in Chayesian institutional reform litigation to control the remedial process, which scholars have criticized as harmful to democratic processes due to the control exercised over public policy by designated groups of plaintiffs’ lawyers.<sup>142</sup>

Though encouraging, the optimistic accounts of this new form of institutional reform litigation give short shrift to three concerns. The first is that the new types of judicial orders that create what Sabel and Simon call “destabilization,” stripped of the gloss that might be placed upon them by comparing them to the hyperspecific and directive orders of Chayesian structural injunctions, nevertheless cannot be anything other than top-down edicts.<sup>143</sup> At a certain point, a legislature may not decide for itself *not* to pursue or accomplish the substantive “goals” set out in one of these orders. The goals, ostensibly at least, are operationalizations of judicial mandates, either expressed or implied, and they carry with them the latent, yet still potent, power of the court.

Second, in school finance litigation at least, the “new publics” that have developed in response to plaintiff-friendly judgments have been strikingly similar to the “old publics” that filed each suit in the first place. The lawyers for the plaintiffs and the interest groups often at the heart of the cases, if permitted, stay closely involved during the remedial process, often returning to the court not directly for periodic reporting but for relitigation of the remedy, where they are unsatisfied with legislative efforts resulting from goal-oriented judicial orders.<sup>144</sup> The cases often remain adversarial, rather than

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140. *Id.*

141. *Id.* at 1022–28.

142. ROSS SANDLER & DAVID SCHOENBROD, *DEMOCRACY BY DECREE: WHAT HAPPENS WHEN COURTS RUN GOVERNMENT* 142 (2003).

143. Sabel & Simon, *supra* note 78, at 1020.

144. For example, after the Ohio Supreme Court decided *DeRolph v. State*, 780 N.E.2d 529 (Ohio 2002), and issued a goal-oriented, nondirective order, the court was forced to revisit the case several times through compliance actions, and even after all of these additional appeals, the court finally dismissed the case without holding that the legislature had achieved such compliance. *Id.* at 529–35 (recounting the serial relitigation of the case in the state’s courts). Sabel and Simon use Texas and Kentucky as their examples, and it is true that, in both of these states, the courts refrained from issuing directive remedial orders, preferring to state goals instead. Nevertheless, although conditions improved, both states found themselves faced with education clause litigation brought by the same interest groups that filed the initial suits shortly thereafter. See generally *Opinion & Order, Young v. Williams*, Nos. 03-CI-00055, 03-CI-01152 (Ky. Cir. Ct., Franklin Cnty., Div. II, Feb. 13, 2007);

cooperative, and their progress continues to be directed by an identifiable “control group” of lawyers even where a judge issues a dialogic order. Thus, although the days of detailing the square footage of a prison cell in a remedial order appear to be gone,<sup>145</sup> the new experimentalist process looks very much like the old command-and-control process in most other ways.

Finally, for all of the rhetoric of individual rights that exists in the cases, few individual plaintiffs, if any, ever receive any direct relief for the proved violation of their own individual rights to education. In these dialogic or experimentalist cases, courts do not order any particular action to remedy any individual harms. Rather, as Sabel and Simon describe, courts merely set statewide substantive quality goals and allow the political actors subject to the order to pursue these goals.<sup>146</sup> At no point does a court order that the educational situation of a named plaintiff be set right. This lack of specification of the remedy, while undoubtedly satisfying to judges looking at conflicts with legislatures, is destructive to the legitimacy of rights adjudication. From the perspective of an individual plaintiff, the court has held that the plaintiff has a right and that the right has been violated. But the court has not offered any particularized relief for the violation, and indeed has even left the ostensible violator partially in charge of determining how the violation will be remedied. Inevitably, the right is devalued at best and eliminated at worst.<sup>147</sup>

Defenders may claim that plaintiffs are at peace with this adjustment of the normal process of litigation and that, as public interest representatives, or as members of new publics, plaintiffs naturally will feel vindicated by the progress and attention to their issues that a dialogic judicial decree causes. This may be true in some cases, but it is not true in all. For example, when the Supreme Court of Idaho held that state’s school system unconstitutional and proceeded to engage the destabilization process that Sabel and Simon advance,<sup>148</sup> the plaintiffs certainly did not accept the lack of

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Plaintiffs’ Original Petition & Request for Declaratory Judgment, Tex. Taxpayer & Student Fairness Coal. v. State, No. D-1-GN-11-003130 (Tex. Dist. Ct. 200th filed Oct. 10, 2011). The Texas case is ongoing, while the Kentucky case was dismissed as nonjusticiable and was not appealed by the plaintiffs.

145. Sandler & Scheonbrod, *supra* note 105, at 928.

146. Sabel & Simon, *supra* note 78, at 1022–28.

147. This conclusion is a natural extension of the well-known theory of “remedial equilibration” developed by Professor Daryl Levinson. See generally Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857 (1999) (observing that the ways in which courts choose to enforce rights are influenced by the courts’ remedial concerns).

148. Idaho Sch. for Equal Educ. Opportunity v. State, 129 P.3d 1199, 1208 (Idaho 2005) (“We affirm the conclusion of the district court that the current funding system is simply not sufficient to carry out the Legislature’s duty under

direct remediation of the violation of their rights. Instead, they filed suit in federal court against the justices of the Supreme Court of Idaho, alleging violations of their fundamental right to a remedy.<sup>149</sup> Although the suit was ultimately dismissed on *Rooker-Feldman* Doctrine<sup>150</sup> grounds, it stands as a powerful rejoinder to those who would dismiss the interests of plaintiffs who are told that they have rights and that these rights have been violated, but who receive no specific relief.

Moreover, courts employing the experimentalist approach have continued to be confronted with separation of powers problems. Some of the primary courts exemplifying the experimentalist approach have even ultimately bowed to these pressures and withdrawn ongoing judicial supervision, either by declaring that the state is now in compliance with the constitution based on a lenient standard of review that would have upheld the system in the first instance<sup>151</sup> or by re-affirming that the constitution is not satisfied, but holding that further court involvement is not necessary.<sup>152</sup>

In the final analysis, then, the dialogic or experimentalist approaches to remediation have presented the same institutional concerns as specific remedial injunctions. In each case, because the courts make substantive judgments of the inadequacy of the state school system, the courts must also directly or indirectly supervise the substantive content of legislative policies. Further, in each case

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the constitution. . . . The appropriate remedy, however, must be fashioned by the Legislature and not this Court.”).

149. *Kress v. Copple-Trout*, No. CV-07-261-S-BLW, 2008 WL 352620, at \*2 (D. Idaho Feb. 7, 2008), *dismissed on reconsideration*, 2008 WL 2095602 (D. Idaho May 16, 2008). Though this suit was ultimately dismissed, the plaintiffs’ apparent need to file and prosecute it illustrates, from a plaintiff’s perspective, the problems inherent in conceptualizing a constitutional provision that states an affirmative duty as a power. *Id.* at \*1–3.

150. *See D.C. Court of Appeals v. Feldman*, 460 U.S. 462, 463 (1983) (holding that a federal court may not sit in appellate judgment of a state law decision by a state court); *Rooker v. Fid. Trust Co.*, 263 U.S. 413, 415 (1923) (reaching the same conclusion).

151. *Hancock v. Comm’r of Educ.*, 822 N.E.2d 1134, 1140 (Mass. 2005) (Marshall, C.J., concurring) (plurality opinion) (holding that the state system would not be invalidated because the plaintiffs failed to show that the legislature acted in an “arbitrary, nonresponsive, or irrational way to meet the constitutional mandate”); *Neely v. W. Orange Cove Consol. Indep. Sch. Dist.*, 176 S.W.3d 746, 784–85 (Tex. 2005) (establishing “arbitrariness” as the touchstone for whether a state education finance system is unconstitutional and upholding the state system due to the failure of the plaintiffs to establish that it was “arbitrary”); *see also Roosevelt Elementary Sch. Dist. No. 66 v. State*, 74 P.3d 258, 268 (Ariz. Ct. App. 2003) (holding that the failure to establish a causal link between an alleged lack of funding and low student achievement prevented the plaintiffs from proving a constitutional violation).

152. *State v. Lewis*, 789 N.E.2d 195, 202–03 (Ohio 2003) (reaffirming that the state constitution was violated but certifying the court’s ultimate withdrawal from its ongoing supervisory role in the litigation).

founded on individual rights, the courts have subverted the idea of individual rights after adjudicating these rights to be violated, thus devaluing them. Faced with these remedial issues and the inevitable risks to their institutional capital, it is understandable that a number of state courts have decided to avoid adjudicating these claims altogether, holding them to be nonjusticiable.<sup>153</sup>

Another approach is possible, one that protects the judiciary from encroaching on legislative functions where judges merely disapprove of the outcomes of legislative deliberations, but protects the judiciary's ability to correct gross failures of political will in extreme cases. To work, however, this approach must take into account the true constitutional status of education in each state. Despite all the talk of individual rights to education, education clause litigation, as currently conceived, is not really about individual rights. Like all other constitutional questions concerning affirmative provisions, it is about systemic duties to the public as a whole. The next Subpart develops a theory of the nature of a systemic affirmative legislative duty and applies this theory to state constitutional education clauses.

## B. Education as a Systemic Duty

### 1. The Importance of the Proper Conception

A right entitles a specific person to a specific thing, be it the action or the forbearance of another. A negative *constitutional* right, therefore, entitles its holder to the *government's forbearing from acting* against the holder in some way, and a positive *constitutional* right entitles its holder to the *government's action* on the holder's behalf.<sup>154</sup> In contrast, a duty obligates its *holder* to act or forbear from acting but does not necessarily entitle *another party* to any specific action or forbearance as to that party.<sup>155</sup> In the world of

153. See *Coal. for Adequacy & Fairness in Sch. Funding, Inc. v. Chiles*, 680 So. 2d 400, 405 (Fla. 1996) (dismissing an adequacy-based challenge as a nonjusticiable political question); *Comm. for Educ. Rights v. Edgar*, 672 N.E.2d 1178, 1191 (Ill. 1996) (dismissing the case as a nonjusticiable political question); *Neb. Coal. for Educ. Equity & Adequacy v. Heineman*, 731 N.W.2d 164, 178–79 (Neb. 2007) (dismissing the case as a nonjusticiable political question); *Okla. Educ. Ass'n v. State*, 158 P.3d 1058, 1065–66 (Okla. 2007) (dismissing the case as a nonjusticiable political question); *Marrero v. Commonwealth*, 739 A.2d 110, 113–14 (Pa. 1999) (dismissing the case as a nonjusticiable political question); *City of Pawtucket v. Sundlun*, 662 A.2d 40, 58–59 (R.I. 1995) (dismissing the case as a nonjusticiable political question); see also *Ex parte James*, 836 So. 2d 813, 818–19 (Ala. 2002) (employing the political question doctrine retroactively to dismiss ongoing litigation that had already resulted in plaintiff victories at the Alabama Supreme Court level).

154. Currie, *supra* note 11, at 865–66.

155. M.D.A. FREEMAN, *LLOYD'S INTRODUCTION TO JURISPRUDENCE* 357 (7th ed. 2001) (explaining that, while every individual right imposes a correlative duty on some person or entity, not every duty implies a correlative right).



positive constitutional duties and positive constitutional rights, this distinction makes an enormous difference.

If the affirmative provisions that exist in state constitutions and in some national constitutions are construed as rights provisions, then these provisions should entitle specific individuals to demand specific goods or levels of service to themselves. Otherwise, in what sense are education rights, "rights"?<sup>156</sup> If, however, education clauses are read as purely duty provisions, then they obligate government to pursue the ends identified but do not necessarily entitle any person to a particular level of government service.

The recognition of this distinction allows us to further recognize a vitally important point: no state supreme court has truly recognized anything that could be accurately described as a "positive right to education" under its state constitution. Over the course of the second wave of school finance litigation, the language of fundamental rights was employed extensively. Although some state courts came to different conclusions than the Supreme Court did in *Rodriguez* as to whether education should be characterized as a "fundamental right," in each of these cases, as well as in the many cases that came to the same conclusion as the *Rodriguez* Court, the courts approached the question with the same purpose—to determine the level of equal protection scrutiny to apply.<sup>157</sup> Of course, "fundamental rights" justifying strict scrutiny in equal

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156. See *supra* note 3 and accompanying text (discussing positive rights). I leave to the side for present purposes that the individual positive rights of which so many commentators and courts speak may actually be collective rights. See Bauries, *supra* note 129, at 759 ("Are education rights, if they exist, individual or collective?"). In practical terms, there is little to no distinction between a "collective right" and a systemic legislative duty. See Douglas Sanders, *Collective Rights*, 13 HUM. RTS. Q. 368, 369–70 (1991) (explaining that, unlike group rights, such as affirmative action, collective bargaining, and class action rights, which use the power of the group to achieve rights-enhancing goals for the group's individual members, collective rights seek to advance the group as a whole, an interest that the author describes in the human rights context as ensuring "distinct group survival," but which can be thought of in the school finance context as enhancing the system itself, rather than (or in addition to) the interests of the individuals within the system). In fact, one plausible way to read the Supreme Court of Washington's decision in *Seattle School District v. State*, 585 P.2d 71, 91–92 (Wash. 1978), is as an interpretation of the state constitution's education clause to establish *both* a systemic duty and a collective right in "all children residing within the borders of the State." *Id.* at 91 ("Therefore, all children residing within the borders of the State possess a 'right,' arising from the constitutionally imposed 'duty' of the State, to have the State make ample provision for their education."). For an "expressivist" account of state constitutional social and economic rights that draws substantially on collective rights theory, see Helen Hershkoff, "Just Words": *Common Law and the Enforcement of State Constitutional Social and Economic Rights*, 62 STAN. L. REV. 1521, 1553–55 (2010).

157. See Bauries, *supra* note 3, at 327–33 (outlining the use of federal fundamental rights analysis in second-wave cases in the states).

protection cases are not the same thing as “positive rights.”<sup>158</sup> Moreover, to the extent that individual rights justify individual remedies, especially in the positive entitlement context, no state supreme court has ordered an individual remedy pursuant to a judgment of unconstitutionality under its state constitution’s education clause.<sup>159</sup> Acknowledging this set of facts does not mean that education may never be recognized as an individual entitlement under state constitutions, but it does mean that the “fundamental rights” cases do not establish the kind of “education right” (i.e., a positive entitlement) that the literature seems to assume exists in every state.<sup>160</sup>

Once we are able to distinguish between what state constitutions clearly and textually provide (an education duty) and what they *may* imply, but *may also not* imply (a positive education right as an individual entitlement), then we can more easily understand the pressures that state courts are put under when they review education clause claims and the choices that courts make in resolving such claims. We can also better understand why the enterprise of education clause litigation has largely been a failure, or at least a massive disappointment.<sup>161</sup>

Accepting my descriptive conclusion—that state constitutions do not textually provide for more than duties and that no state supreme court has truly analyzed its constitution and found that a positive individual entitlement right to education exists—this leads to a further question. In a world of state legislative duties that do not correlate to individual entitlements, how is a court to approach judicial review?

The first hurdle that would be presented in any such regime would be to determine who can sue to force the legislature to perform its duty. Nearly every state court that has encountered a school finance adequacy suit has had to resolve the question of standing. Now, it is fairly well established that the standing doctrine in state courts is often more forgiving to plaintiffs than in federal courts.<sup>162</sup> Some of the reasons for this are textual—for example, explicit authorization for the rendering of advisory opinions in some state constitutions.<sup>163</sup> Some of the reasons are historical—several states have authorized generalized grievance

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158. See *supra* note 11 and accompanying text (distinguishing between negative rights, such as equal protection, and positive rights). But see Calabresi & Agudo, *supra* note 32, at 108–09 (using the latter concept to define the former).

159. See Bauries, *supra* note 129, at 757–59.

160. See *supra* note 3 and accompanying text (discussing the literature’s strongly rights-focused approach to school finance litigation).

161. See, e.g., Dunn & Derthick, *supra* note 128, at 322.

162. Hershkoff, *Passive Virtues*, *supra* note 78, at 1844–68 (discussing standing to sue in state courts).

163. *Id.* at 1844–52 (discussing advisory opinions in the states).

litigation, especially to challenge taxation legislation, since long before the Supreme Court began focusing its eye on standing under Article III in the mid-twentieth century.<sup>164</sup> Accordingly, as it turns out, the standing issue has not presented much of a problem for education clause plaintiffs.

The second hurdle, however, as discussed above, would be the more significant question of whether and how legislative action in performing its systemic duty may be adjudicated where the challenge is based on the qualitative terms of the education clause. In other words, assuming that the legislature has a compulsory duty to legislate on education and that the legislature has so legislated, if this legislation falls short of what a proper plaintiff thinks is "adequate," or some variant thereof, may the courts decide whether the plaintiff is correct? And if so, may the courts remediate the harms of this inadequate legislation? Like the first hurdle, this hurdle must be cleared in nearly every education clause suit that is filed. Unlike the standing question, however, it is often resolved against the plaintiff's interest, either at the threshold stage or at the remedial stage.

At times, state supreme courts have indeed approached education clauses squarely as the sources of legislative duties, rather than (or in addition to) rights. The most forceful of these analyses was rendered in 1978 by the Supreme Court of Washington, which held that the education clause in the state constitution "does not merely seek to broadly declare policy, explain goals, or designate objectives to be accomplished. It is declarative of a constitutionally imposed *Duty*."<sup>165</sup> States drawing from the Washington analysis have at times spoken of rights and at other times spoken of duties or muddled the two concepts, but all have approached their clauses in similar ways—as demands on the legislature to meet the substantive standards stated within them.<sup>166</sup>

The Supreme Court of Kentucky, in perhaps the seminal third wave decision, held that the word "efficient" in the state's education clause imposed an obligation on the state's legislature to provide an "adequate" education, with the goal being:

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164. *Id.* at 1852–59 (discussing generalized grievances and public actions in the states).

165. *Seattle Sch. Dist. No. 1 v. State*, 585 P.2d 71, 85 (Wash. 1978) (en banc).

166. *See, e.g., Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 212 (Ky. 1989) ("A child's right to an adequate education is a fundamental one under our Constitution. The General Assembly must protect and advance that right."); *McDuffy v. Sec'y of Exec. Office of Educ.*, 615 N.E.2d 516, 519 (Mass. 1993) ("[W]e shall restrict ourselves to a determination whether the constitutional language of [the education clause], is merely hortatory, or aspirational, or imposes instead a constitutional duty on the Commonwealth to ensure the education of its children in the public schools. We conclude that a duty exists.").

to provide each and every child with at least the seven following capacities: (i) sufficient oral and written communication skills to enable students to function in a complex and rapidly changing civilization; (ii) sufficient knowledge of economic, social, and political systems to enable the student to make informed choices; (iii) sufficient understanding of governmental processes to enable the student to understand the issues that affect his or her community, state, and nation; (iv) sufficient self-knowledge and knowledge of his or her mental and physical wellness; (v) sufficient grounding in the arts to enable each student to appreciate his or her cultural and historical heritage; (vi) sufficient training or preparation for advanced training in either academic or vocational fields so as to enable each child to choose and pursue life work intelligently; and (vii) sufficient levels of academic or vocational skills to enable public school students to compete favorably with their counterparts in surrounding states, in academics or in the job market.<sup>167</sup>

Some states have adopted the Kentucky formulation wholesale;<sup>168</sup> others have adapted it;<sup>169</sup> still others have created their own formulations.<sup>170</sup> But as in Kentucky, state supreme courts have generally evaluated compliance with their education clauses by examining whether the state school system *in fact* evidences these sorts of qualitative elements,<sup>171</sup> usually in comparison with

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167. *Rose*, 790 S.W.2d at 212.

168. *McDuffy*, 615 N.E.2d at 618 (“The guidelines set forth by the Supreme Court of Kentucky fairly reflect our view of the matter and are consistent with the judicial pronouncements found in other decisions.”).

169. *Abbeville Cnty. Sch. Dist. v. State*, 515 S.E.2d 535, 540 (S.C. 1999) (“We define this minimally adequate education required by our Constitution to include providing students adequate and safe facilities in which they have the opportunity to acquire: 1) the ability to read, write, and speak the English language, and knowledge of mathematics and physical science; 2) a fundamental knowledge of economic, social, and political systems, and of history and governmental processes; and 3) academic and vocational skills.”).

170. *Conn. Coal. for Justice in Educ. Funding, Inc. v. Rell*, 990 A.2d 206, 253–54 (Conn. 2010) (“Thus, we conclude that [the education clause], entitles Connecticut public school students to an education suitable to give them the opportunity to be responsible citizens able to participate fully in democratic institutions, such as jury service and voting. A constitutionally adequate education also will leave Connecticut’s students prepared to progress to institutions of higher education, or to attain productive employment and otherwise contribute to the state’s economy. To satisfy this standard, the state, through the local school districts, must provide students with an objectively ‘meaningful opportunity’ to receive the benefits of this constitutional right.”).

171. *See id.* at 249–50 (“[O]ur research has revealed that those state courts that have reached the merits of the issue overwhelmingly have held that there is a floor with respect to the adequacy of the education provided pursuant to their states’ education clauses; that education must be in some way ‘minimally adequate’ or ‘soundly basic.’ Furthermore, many of these decisions have

professionally derived standards<sup>172</sup> or the systems of other states.<sup>173</sup> States choosing not to engage this substantive evaluation of the qualitative adequacy of the state's school system have generally done so on the theory that, despite the existence of an education clause in the state's constitution, the matter is nonjusticiable.<sup>174</sup>

With due respect to the hard work that it has taken over the years to define, develop, advocate for, and apply these qualitative standards, this substantive evaluative approach is inconsistent with the nature of the duty imposed by each state's education clause. Just as inconsistent, however, is the set of decisions dismissing education clause challenges as nonjusticiable, as these decisions both render the obligations stated in a state's education clause nugatory and on their own terms fail to take account of the broader legislative duties underlying even provisions stating specific affirmative legislative obligations. In the Subpart below, I flesh out these broader duties, which are fiduciary in character.

## 2. *The Fiduciary Theory of Representative Government*

Legislative duties are fiduciary duties. That is, power exercised by a legislative body is a delegated or entrusted power, which the legislature must use in the best interests of the entrustor—the people.<sup>175</sup> This idea is as old as Western political philosophy.<sup>176</sup> It had its origins in Plato's "philosopher kings,"<sup>177</sup> found its way into

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articulated comprehensive standards that have defined the components of a constitutionally adequate education . . .").

172. See R. Craig Wood & Bruce D. Baker, *An Examination and Analysis of the Equity and Adequacy Concepts of Constitutional Challenges to State Education Finance Distribution Formulas*, 27 U. ARK. LITTLE ROCK L. REV. 125, 144–168 (2004) (analyzing and critiquing the different expert methodologies used to "cost out" adequate education funding in the scholarship and the cases).

173. See, e.g., *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 213 (Ky. 1989) (justifying that in its judgment of unconstitutionality in part, "[w]e have described, *infra*, in some detail, the present system of common schools. We have noted the overall inadequacy of our system of education, when compared to national standards and to the standards of our adjacent states.").

174. See *supra* note 144.

175. The ancient idea of governance as a fiduciary responsibility has taken on new life due to recent scholarly work, some predating this Article, and some authored contemporaneously. See *supra* note 1. Each of these treatments focuses on different elements of a government's fiduciary duty, but none confronts the important state constitutional question of affirmative constitutional duties to legislate on a particular topic—the topic addressed herein.

176. For a comprehensive review of the origins and development of the "government-as-fiduciary" conception from the beginnings of Western political theory to the time of the American Revolution, see Natelson, *Public Trust*, *supra* note 35, at 1097–1123.

177. *Id.* at 1097 (discussing PLATO, *THE REPUBLIC* 164 (H.D.P. Lee trans., 1961)).

Roman political philosophy through Cicero,<sup>178</sup> and made it into English political thought first through King James I.<sup>179</sup> Once there, the fiduciary concept became a subject of political thought in England and developed further during the centuries leading to the American Revolution, culminating in the political philosophy of John Locke.<sup>180</sup>

John Locke is nearly universally regarded as being among the most important political philosophers to the thinking of the Framers of the United States Constitution,<sup>181</sup> as well as to the drafters of the early state constitutions.<sup>182</sup> Along with contemporaries such as

178. *Id.* at 1099–1100 (quoting MARCUS TULLIUS CICERO, *DE OFFICIIS* (Loeb ed., Walter Miller trans., 1956)).

179. *Id.* at 1103 (quoting JAMES STUART, *THE TRUE LAW OF FREE MONARCHIES*, reprinted in *THE TRUE LAW OF FREE MONARCHIES AND BASILIKON DORON* 56–57 (Daniel Fischlin & Mark Fortier eds., 1996)).

180. See generally JOHN LOCKE, *TWO TREATISES ON GOVERNMENT*, in 5 *THE WORKS OF JOHN LOCKE* 207 (New ed. 1823).

181. See, e.g., GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC: 1776–1787*, at 283–84 (1969) (noting the importance of the Lockean notion of a social compact among the entrustors of power in post-Revolutionary thought); Donald L. Doernberg, “*We the People*”: John Locke, *Collective Constitutional Rights, and Standing to Challenge Government Action*, 73 CALIF. L. REV. 52, 57 (1985) (“It would be difficult to overstate John Locke’s influence on the American Revolution and the people who created the government that followed it.”); Andrew C. McLaughlin, *Social Compact and Constitutional Construction*, 5 AM. HIST. REV. 467, 467 (1900) (“Locke was the philosopher of the American Revolution, as he was of the Revolution of 1688.”); Natelson, *Public Trust*, *supra* note 35, at 1115, 1115 n.157 (terming Locke’s *Second Treatise* “hugely influential” and noting that “Locke was repeatedly cited during the constitutional debates”); John F. Reinhardt, *Political Philosophy from John Locke to Thomas Jefferson*, 13 U. KAN. CITY L. REV. 13, 46 (1944–1945) (“Many of the phrases of the Declaration of Independence may be found in Locke’s *Two Treatises of Government*.”).

182. JAMES A. GARDNER, *INTERPRETING STATE CONSTITUTIONS: A JURISPRUDENCE OF FUNCTION IN A FEDERAL SYSTEM* 60 n.16 (2005) (“State constitutions written between 1776 and 1789 reveal a clear reliance on the Lockean model.”); MARC W. KRUMAN, *BETWEEN AUTHORITY & LIBERTY: STATE CONSTITUTION MAKING IN REVOLUTIONARY AMERICA* 40 (1997) (outlining the influence of Lockean ideas in the early state constitutions). In fact, it appears from the drafting history of state constitutions that, to the extent that Locke’s conception of the social compact evinces a distrust of legislative power, state constitutions have become more Lockean as history has unfolded. See Christian G. Fritz, *The American Constitutional Tradition Revisited: Preliminary Observations on State Constitution-Making in the Nineteenth Century West*, 25 RUTGERS L.J. 945, 967–70 (1994) (discussing the history of state constitutional adoption and revision in the nineteenth century, and pointing out that, as distrust of legislatures grew more widespread, state constitutions became more lengthy, specific, and “legislative”). Although James Gardner is cited in this footnote, he rejects the idea that Locke’s conception of the social compact is useful as a tool for state constitutional interpretation. GARDNER, *supra*, at 122. He bases this rejection on the conclusion that a baseline assumption of the Lockean model—that a distinct polity exists in a state of nature and willfully agrees to form an autonomous state—is not met in the case of the American

Montesquieu, Locke gave us several important ideas—the separation of powers, inalienable rights, and the power of the people to alter their government.<sup>183</sup> In Locke's conception of governance, the people agree amongst themselves, by majority, to cede a portion of the powers and rights of which they individually possess in the "state of nature."<sup>184</sup> The result of this compact is the formation of a government where the legislature exercises "supreme power," but where it may use such power only within the boundaries of the people's entrustment.<sup>185</sup> In fact, Locke refers to the legislative power specifically as a "trust," carrying with it only "a fiduciary power to act for certain ends."<sup>186</sup> Like all trusts, this trust confers

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states, each of which is populated by individuals who have already formed a social compact to create a national government. Gardner's argument is a convincing case for the proposition that states ought not to be viewed as having formed their constitutional governments for the sole purpose of achieving state-specific ends (Hans Linde's primacy thesis), but it does not establish that the Lockean ideas that illuminated the structuring of governmental powers and rights in the early state constitutions and the national constitution ought to be discarded, and I do not read Gardner as urging this result. In fact, in Gardner's account, which places federalism values, rather than the values of an imaginarily distinct state polity, at the center of state constitutional interpretation, each state must establish for its legislature both sufficient power to act to accomplish the ends in the public interest and sufficient limitations on that power to forestall tyranny. See *id.* at 123–36. These ends reflect the essence of Locke's conception of the relationship between the people and the state as a fiduciary one. Added to Locke's conception is merely the element that, in addition to protecting the people from outside attacks and state governmental tyranny, the government must be set up to counterbalance the vast powers of the federal government.

183. Doernberg, *supra* note 181, at 58 n.34, 67.

184. The Declaration of Independence expresses this state as the state in which "all men are . . . endowed by our Creator." THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

185. LOCKE, *supra* note 180, § 149, at 426. The American Founding Fathers, and their state constitutional contemporaries, saw fit to create three coequal branches of government, rather than a supreme legislature and a subordinate executive, as Locke's framework would have suggested.

186. *Id.* § 22, at 351 ("The liberty of man in society is to be under no other legislative power but that established by consent in the commonwealth, nor under the dominion of any will, or restraint of any law, but what that legislative shall enact according to the trust put in it."); *id.* § 136, at 419 ("To this end it is that men give up all their natural power to the society they enter into, and the community put the legislative power into such hands as they think fit, with this trust, that they shall be governed by declared laws, or else their peace, quiet, and property will still be at the same uncertainty as it was in the state of Nature."); *id.* § 149, at 426 ("[Y]et the legislative being only a fiduciary power to act for certain ends, there remains still in the people a supreme power to remove or alter the legislative, when they find the legislative act contrary to the trust reposed in them."). In addition to these statements, in Locke's direct enumeration of the limits of legislative power, he speaks explicitly in terms of a "trust":

*These are the bounds which the trust that is put in them by the society and the law of God and Nature have set to the legislative power of*

upon the legislature both power (or discretion) and duty—fiduciary duty, to be specific.<sup>187</sup>

Locke's conception of the relationship between the people and their legislature is most explicit in section 149 of his *Second Treatise on Government*. There, he summarizes the features of government by consent:

Though in a constituted commonwealth standing upon its own basis and acting according to its own nature—that is, acting for the preservation of the community, there can be but one supreme power, which is the legislative, to which all the rest are and must be subordinate, yet the legislative being only a fiduciary power to act for certain ends, there remains still in the people a supreme power to remove or alter the legislative, when they find the legislative act contrary to the trust reposed in them. For all power given with trust for the attaining an end being limited by that end, whenever that end is manifestly neglected or opposed, the trust must necessarily be forfeited, and the power devolve into the hands of those that gave it, who may place it anew where they shall think best for their safety and security.<sup>188</sup>

Two implications of this expression of the fiduciary construct bear further discussion.

First, it is clear that Locke viewed the fiduciary duty of the legislature—and, by extension, the government—to be an overriding limitation on the legislature's actions, superseding any independent or specific limitations that might also exist in the constitution. That is, under a Lockean view, it would be possible to comply with a specific limitation on government action—staying within the bounds of an enumerated power, for example—while nevertheless violating the overriding fiduciary duty to act in the interests of the public at

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every commonwealth, in all forms of government. First: They are to govern by promulgated established laws, not to be varied in particular cases, but to have one rule for rich and poor, for the favourite at Court, and the countryman at plough. Secondly: These laws also ought to be designed for no other end ultimately but the good of the people. Thirdly: They must not raise taxes on the property of the people without the consent of the people given by themselves or their deputies. And this properly concerns only such governments where the legislative is always in being, or at least where the people have not reserved any part of the legislative to deputies, to be from time to time chosen by themselves. Fourthly: The legislative neither must nor can transfer the power of making laws to anybody else, or place it anywhere but where the people have.

*Id.* § 142, at 423 (emphasis added).

187. Scholars have recognized that Locke's conception of the legislature's power is one of fiduciary power, which comes with fiduciary duties to the public. See, e.g., Jenkins, *supra* note 1, at 543 ("Both the executive and the legislature have a fiduciary trust to act for the public good.").

188. LOCKE, *supra* note 180, § 149, at 426.



all times—for example, by acting within an enumerated power to benefit a private actor at the expense of the public.

Second, it must therefore also be true that, where a more specific limitation on government power is not subject to enforcement by the courts in its specific terms—for example, because those terms are indeterminate or vague—the overriding fiduciary duty may provide an avenue for judicial relief.<sup>189</sup> This idea that the “public interest” or a “public purpose” is an overarching requirement for all legislation is the idea that undergirded much of the Supreme Court’s *Lochner*-era jurisprudence,<sup>190</sup> and it continues to form the basis of jurisprudence under the Takings Clause (though the “public use” requirement is explicit there),<sup>191</sup> the Necessary and Proper Clause,<sup>192</sup> and the “congruence and proportionality” requirement under section five of the Fourteenth Amendment.<sup>193</sup>

The Lockean conception of the social compact—the conception that most influenced the Framers, as well as their state constitutional forebearers—views the legislative power as a public trust granted to the legislature for exercise only in the public’s interest. Under the United States Constitution, this general fiduciary duty is limited by the terms of the initial entrustment. The doctrine of enumerated powers is one expression of this limit. The reservation of certain individual rights is another. These explicit limitations are analogous to the circumscribing of the authority of a trustee in a trust instrument. The fiduciary character of the relationship between the people and the state adds to these limitations the general limitations on the fiduciary’s power to act—or to refrain from acting—that exist by default.<sup>194</sup> Because the nature of the arrangement is one of fiduciary trust, then, the specific

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189. This is, of course, an extrapolation of Locke’s idea that the people, as entrustors, have the power to revoke the trust (to revolt) whenever the fiduciary acts outside the terms of the entrustment. *Id.* We do not have revolutions every time that Congress or state legislatures act outside their constitutional boundaries today; rather, the genius of the Founding Fathers, applying Locke’s ideas in light of Montesquieu’s refinement of separated powers and checks and balances, established judicial review as the avenue to police violations of the people’s entrustment. Nevertheless, this use of judicial review, though short of revolution, is still a distinctly Lockean way to check abuses of fiduciary entrustment.

190. See Clark Neily, *No Such Thing: Litigating Under the Rational Basis Test*, 1 N.Y.U. J. L. & LIBERTY 898, 900–03 (2005).

191. See generally *Kelo v. City of New London*, 545 U.S. 469 (2005) (generating outrage nationwide precisely because of the perception that the city engaging in the taking was acting to deprive individuals of their property for a primarily private purpose).

192. See J. Randy Beck, *The Heart of Federalism: Pretext Review of Means-End Relationships*, 36 U.C. DAVIS L. REV. 407, 412 (2003).

193. See *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 365 (2001).

194. Tamar Frankel, *Fiduciary Duties as Default Rules*, 74 OR. L. REV. 1209, 1210–12 (1995).

limitations must be read in light of the more general limitations that all fiduciary relationships place on fiduciaries, specifically the duties of care and loyalty.<sup>195</sup> I turn to these next.

a. Legislative “Loyalty”

Throughout the history of constitutional law, and particularly in the most recent century of this history, courts have enforced aspects of Congress’s and state legislatures’ duties of loyalty. A fiduciary duty of loyalty entails a fiduciary’s responsibility not to act against the interests of his principal, whether by self-dealing<sup>196</sup> or by a more general breach of trust, such as the taking of an act against the principal, regardless of direct benefit to the fiduciary.<sup>197</sup> Applied to legislative action, the fiduciary principle of the duty of loyalty would seem clearly to ban self-interested legislating, such as the use of the Spending Power to earmark funds for a particular legislator’s district,<sup>198</sup> except, possibly, where the earmark also accomplishes a public purpose.<sup>199</sup>

More importantly, the duty of loyalty forms a plausible foundation for the various doctrines of negative rights enforcement developed in the federal courts and adopted by most state courts. Where a government actor acts against the enumerated right of an individual, it inherently acts disloyally to that person—against that person’s interests. However, the government’s fiduciary duties do not run to individuals; they run to the polity as a whole.<sup>200</sup> Accordingly, while a government action against the rights of an individual may be presumptively unconstitutional, even action clearly in conflict with the individual’s rights may be valid if the interests of the polity outweigh such interests of the individual.

195. See, e.g., Natelson, *Agency*, *supra* note 1, at 322 (stating that, in applying an agency principle to Congress’s action under the Necessary and Proper Clause, it is “to remain within its (somewhat restricted) realm of authority, and proceed in good faith, with reasonable care, and with impartiality and loyalty toward its constituents”).

196. See, e.g., Karen E. Boxx, *Of Punctilios and Paybacks: The Duty of Loyalty Under the Uniform Trust Code*, 67 MO. L. REV. 279, 282–83 (2002).

197. See, e.g., E. Haavi Morreim, *The Clinical Investigator as Fiduciary: Discarding a Misguided Idea*, 33 J.L. MED. & ETHICS 586, 589 (2005) (“Somewhat less obviously, the fiduciary also must not compromise the entrustor’s welfare for the benefit of third parties.”).

198. See Natelson, *Welfare*, *supra* note 1, at 242.

199. Indeed, it is plausible to view much of the jurisprudence of the *Lochner* Era, including *Lochner* itself, as an attempt to enforce the duty of loyalty by looking behind the stated public purposes of federal and state legislation and assessing whether such legislation was really enacted for the benefit of the public or was instead enacted to benefit private parties or interest groups. See generally DAVID BERNSTEIN, *REHABILITATING LOCHNER* (2011) (showing that some evidence of special interest protection existed in the facts of *Lochner* itself).

200. See LOCKE, *supra* note 180, § 149, at 426.

We operationalize this principle through various doctrinal tests, such as strict scrutiny. For example, suppose a state legislature enacts a law making it a crime to falsely claim that one has been awarded a military medal.<sup>201</sup> An individual is arrested when he is observed wearing a false Congressional Medal of Honor and claiming to those who ask that he won the medal for valorous service in Afghanistan. He is prosecuted, and he challenges the state's power to prosecute him as a violation of his right to free expression.<sup>202</sup> If the state's duty were to run purely to the individual, then this prosecution would be a clear violation of his rights and therefore a breach of the duty of loyalty. But because the state's duty runs to the polity as a whole, the state's action may be justified as a valid attempt to serve the interests of that polity. In effect, the state may justify disloyalty to the individual only with a showing of its overarching loyalty to the collective.

Assuming that the speech in question does not fall under one of the exceptions to the speech protections of the First Amendment,<sup>203</sup> which themselves are based on ex ante balancing of public and individual interests,<sup>204</sup> the government will survive the challenge as long as it can establish a compelling government interest to which the criminal prohibition in question is narrowly tailored.<sup>205</sup> Perhaps the public interest in preserving the value of the honors it bestows on valorous individuals outweighs the individual's right to speak falsely about his own honor.<sup>206</sup> How the case comes out is not

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201. For a similar federal law, see Stolen Valor Act, 18 U.S.C. § 704(b) (2006).

202. A case similar to this hypothetical was, at the initial submission date of this Article, pending before the United States Supreme Court. *United States v. Alvarez*, 617 F.3d 1198, 1200–01 (9th Cir. 2010), *aff'd*, 132 S. Ct. 2537 (2012).

203. *See id.* at 1212–14 (declining to apply the First Amendment exemption, stating, “Although certain subsets of false factual speech have been declared unprotected, such classes of speech were developed as the result of thoughtful constitutional analysis of what other characteristics the speech must have before it can be proscribed without clashing with First Amendment protections. The Act does not fit neatly into any of those ‘well-defined’ and ‘narrowly limited’ classes of speech previously considered unprotected, and we thus are required to apply the highest level of scrutiny in our analysis.”).

204. *See* Sheldon H. Nahmod, *Public Employee Speech, Categorical Balancing and § 1983: A Critique of Garcetti v. Ceballos*, 42 U. RICH. L. REV. 561, 569–73 (2008) (outlining this ex ante form of interest balancing, which Professor Nahmod terms “categorical balancing”).

205. *Citizens United v. Fed. Election Comm’n*, 130 S. Ct. 876, 898 (2010).

206. *See Alvarez*, 617 F.3d at 1217 (rejecting a similar argument based on the narrow tailoring prong). The *Alvarez* case has now been decided, with the Supreme Court holding that the government's interest (i.e., the interest of the people) in protecting the value of military honors, though compelling, does not justify preventing false speech altogether. *Alvarez*, 132 S. Ct. at 2549 (2012). Rather, more narrowly tailored means of protecting the public interest, such as “counterspeech,” are available that would not impact the individual's presumptive right to free expression. *Id.*

important for this discussion—only that the proper inquiry is whether the government is acting loyally to the public interest or whether it is acting against that interest by depriving a person of a reserved right without a compelling justification sounding in the overall public interest. The legislative duty of loyalty, then, is embodied in the jurisprudence of negative rights.

b. Legislative “Care”

If legislative loyalty is about not acting against the interests of an individual citizen unless the general interests of the public align with the action, then legislative care is about acting sufficiently responsibly in the pursuit of the general interests of the public. In private fiduciary law, the duty of care is based on concepts of negligence. A trustee, in administering a trust, must exercise the care “that would be observed by a prudent man dealing with the property of another.”<sup>207</sup> Similarly, a corporate director must act “with the care that an ordinarily prudent person would reasonably be expected to exercise in a like position and under similar circumstances.”<sup>208</sup>

The concepts are difficult to apply to the negative rights context, in which the problem is not the government’s lack of care but rather the government’s acting directly against a member of the polity. However, scholars have shown that the duty of care fits well in certain contexts in the exercise of governmental powers.<sup>209</sup> The fit is even stronger in the area of affirmative legislative duties to legislate.

Affirmative legislative duties resemble instruments of entrustment or incorporation, and they reflect the same sorts of concerns that cause entrustors to specify duties or purposes in such instruments. Although the law of fiduciary relationships is permeated with default duties, settlors and incorporators, along with other entrustors, often have reasons to direct the work of their fiduciaries toward certain ends.

In the trust context, a settlor may specify to a trustee that the trust funds must be invested in certain ways.<sup>210</sup> The law holds the trustee to the duty to follow such directives of the settlor, but continues to impose a general duty of care on the trustee in doing

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207. UNIF. PROBATE CODE § 7-302 (amended 2006).

208. AM. LAW. INST., PRINCIPLES OF CORPORATE GOVERNANCE § 4.01 (1994) [hereinafter ALI].

209. Natelson, *Agency*, *supra* note 1, at 322; Philip J. Levitz, A Modern Fiduciary Theory of the Necessary & Proper Clause (Mar. 1, 2012) (unpublished student scholarship), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2014468](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2014468).

210. GEORGE G. BOGERT & GEORGE T. BOGERT, THE LAW OF TRUSTS AND TRUSTEES § 102 (1987).

so.<sup>211</sup> In the corporate-director context, the articles of incorporation may or may not so specify, but a profit-making company has “as its objective the conduct of business activities with a view to enhancing corporate profit and shareholder gain.”<sup>212</sup> Some corporations, particularly charitable corporations, go further than this general principle of the corporate purpose and specify a purpose in the articles of incorporation.<sup>213</sup> Similarly to trustees, though, the directors of both such corporations must pursue the stated purpose, or the underlying corporate purpose to seek profit, while exercising due care.<sup>214</sup>

Applied to affirmative duties to legislate on particular topics, it is a natural conclusion that the statement of a duty in a constitution directs the legislature’s action at a particular desired policy end, just as a similar statement of purpose might direct the action of a trustee or corporate board, while preserving the underlying fiduciary duties that the trustee or board also possesses. In the legislative context, the imposition of an affirmative duty to legislate on a particular topic may be thought of as a mandate with strict terms that must be complied with, or as a direction of the legislature’s actions toward an end, coupled with the sort of discretion that a trustee or corporate director is expected to exercise with reasonable care even in the presence of a purpose-driven mandate. In the Subpart below, I examine one such affirmative constitutional duty to legislate—the education duty that exists in every state constitution—and I show that the latter approach is best fit to this duty.

### 3. *The Education Duty*

By now, it cannot be gainsaid that the Constitution was highly influenced by the fiduciary conception of governance.<sup>215</sup> Examining the current text of various state constitutions adopted at differing times over the course of American history reveals a pervasive adoption of Lockean entrustment ideals in those documents as well. Almost every state constitution, regardless of when adopted, begins with a prefatory clause that declares the establishment of the state

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211. *Id.* § 683 (“A trustee has a duty to use ordinary, reasonable skill and prudence in following the directions or authority of the settlor with regard to trust investments.”).

212. ALI, *supra* note 208, § 2.01.

213. See MODEL NONPROFIT CORP. ACT § 2.02(b)(6)(i) (2008) (permitting a purpose to be specified in the articles of incorporation).

214. See MODEL NONPROFIT CORP. ACT § 8.30(b) (2008) (“The members of the board of directors or a committee of the board, when becoming informed in connection with their decision-making function or devoting attention to their oversight function, must discharge their duties with the care that a person in a like position would reasonably believe appropriate under similar circumstances.”); ALI, *supra* note 208, § 4.01(a).

215. See Natelson, *Public Trust*, *supra* note 35, at 1088–91.

government as a willing act of "the People,"<sup>216</sup> and every state constitution contains at least one clause affirming the Lockean idea of popular sovereignty as the foundation of state governmental power.<sup>217</sup>

These features are far from dated. Indeed, even Hawaii, the state most recently admitted to statehood, includes an explicit Lockean clause in its state constitution.<sup>218</sup> And Georgia, the state with the most recently adopted constitution (its eleventh version) makes the Lockean entrustment ideal even more explicit: "All government, of right, originates with the people, is founded upon their will only, and is instituted solely for the good of the whole. Public officers are the trustees and servants of the people and are at all times amenable to them."<sup>219</sup>

Thus, far from being a relic of the colonial and early national days, the core ideal of government power as an entrustment of fiduciary duties from the people to the state is present and explicit nationwide.

State constitutions are permeated with the language of governmental power as a "public trust."<sup>220</sup> But we also see elements

216. See, e.g., DEL. CONST. pmbl. ("Through divine goodness, all people have by nature the rights of worshipping and serving their Creator according to the dictates of their consciences, of enjoying and defending life and liberty, of acquiring and protecting reputation and property, and in general of obtaining objects suitable to their condition, without injury by one to another; and as these rights are essential to their welfare, for due exercise thereof, power is inherent in them; and therefore all just authority in the institutions of political society is derived from the people, and established with their consent, to advance their happiness; and they may for this end, as circumstances require, from time to time, alter their Constitution of government.").

217. See, e.g., ALA. CONST. art. I, § 2 ("That all political power is inherent in the people, and all free governments are founded on their authority, and instituted for their benefit; and that, therefore, they have at all times an inalienable and indefeasible right to change their form of government in such manner as they may deem expedient."); ALASKA CONST. art. I, § 2 ("All political power is inherent in the people. All government originates with the people, is founded upon their will only, and is instituted solely for the good of the people as a whole."); ARIZ. CONST. art. II, § 2 ("All political power is inherent in the people, and governments derive their just powers from the consent of the governed, and are established to protect and maintain individual rights."); ARK. CONST. art. II, § 1 ("All political power is inherent in the people and government is instituted for their protection, security and benefit; and they have the right to alter, reform or abolish the same, in such manner as they may think proper.").

218. See HAW. CONST. art. I, § 1 ("All political power of this State is inherent in the people and the responsibility for the exercise thereof rests with the people. All government is founded on this authority.").

219. GA. CONST. art. II, § 1, ¶ I.

220. See, e.g., COLO. CONST. art. XXIX, § 6 ("Any public officer, member of the general assembly, local government official or government employee who breaches the public trust for private gain and any person or entity inducing such breach shall be liable to the state or local jurisdiction for double the amount of the financial equivalent of any benefits obtained by such actions.");

of distrust of legislative fidelity to the public's entrustment. Although it is axiomatic that state legislative power is "plenary,"<sup>221</sup> at varying levels in state constitutions, we see the familiar, broad, power-granting language that we find in the Constitution.<sup>222</sup> As G. Alan Tarr points out, because state power is plenary in its default sense, specific grants of legislative power are best read not as authorizations, but as limitations.<sup>223</sup> Enumerations of power being unnecessary in a state constitution, they function most clearly as the people's assertion of control over their fiduciaries.

Also ubiquitous are detailed procedural requirements for legislating—for instance, requirements that legislation address a single subject, that each house keep a journal, or that a bill be read a certain number of times out loud prior to passage.<sup>224</sup> Many state constitutions also contain non-right-based provisions placing substantive limitations on legislation, some of which explicitly call for judicial involvement. For example, in stating the prohibition of "special" legislation that exists in nearly every state constitution,

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FLA. CONST. art. II, § 8 ("A public office is a public trust. The people shall have the right to secure and sustain that trust against abuse."); GA. CONST. art. I, § 2, ¶ 1 ("All government, of right, originates with the people, is founded upon their will only, and is instituted solely for the good of the whole. Public officers are the trustees and servants of the people and are at all times amenable to them.").

221. See G. ALAN TARR, *UNDERSTANDING STATE CONSTITUTIONS* 7 (1998). This view has long been the conventional one in state constitutionalism. See THOMAS M. COOLEY, *A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION* 127–35 (1896) (collecting cases). "Plenary" should not be confused for "supreme" in the Lockean sense, as the former describes the scope of the legislative power—what objects it may address—while the latter describes the authority of the power—the extent to which it may be checked by the other branches of government or by popular will. Constitutional drafters adopted most of Locke's prescriptions for representative government, but they left the legislative power checked by two co-equal branches, where Locke would have left it supreme and would have lodged the ultimate check in the people's power to alter, abolish, or reform their government. LOCKE, *supra* note 180, § 149, at 426.

222. See, e.g., FLA. CONST. art. III, § 1 ("The legislative power of the state shall be vested in a legislature of the State of Florida, consisting of a senate composed of one senator elected from each senatorial district and a house of representatives composed of one member elected from each representative district."); VT. CONST. ch. II, § 6 ("[Legislatures] may prepare bills and enact them into laws, redress grievances, grant charters of incorporation, subject to the provisions of section 69, constitute towns, boroughs, cities and counties; and they shall have all other powers necessary for the Legislature of a free and sovereign State; but they shall have no power to add to, alter, abolish, or infringe any part of this Constitution.").

223. TARR, *supra* note 221, at 8–9. Tarr also points out that at least one state has acted by constitutional amendment to forestall such an interpretation. See *id.* at 9 n.10. (quoting ALASKA CONST. art. XII, § 8).

224. For a sampling of these sorts of provisions, see Scott R. Bauries, *State Constitutional Design and Education Reform: Process Specification in Louisiana*, 40 J.L. & EDUC. 1, 7–8 (2011).

the Michigan Constitution explicitly calls for nondeferential judicial review:

In all cases when a general law can be made applicable, a special law shall not be enacted except as provided in section 2. Whether a general law could have been made applicable in any case shall be judicially determined without regard to any legislative assertion on that subject.<sup>225</sup>

So, the people of Michigan have enshrined, as a constitutional principle, both the duty to legislate only in the general public interest and the policy of zero judicial deference to legislative defenses against claims of breach of this duty. A reasonable reading of this provision is that the people, though entrusting the power of legislation to the state legislature, remained skeptical that this power would always be used in the public interest, and that, rather than calling for revolution in cases where the trust was broken, as Locke would have counseled,<sup>226</sup> the people favored a judicial resolution. The call for no judicial deference evinces a presumption that, where special legislation has been enacted, the legislature has breached its fiduciary obligations.

State constitutions should therefore be viewed as strongly Lockean documents. Examining the text and structure of state constitutional documents reveals a strong affirmation of the Lockean ideals of popular sovereignty<sup>227</sup> and the people as a repository of inalienable rights.<sup>228</sup> Nearly every state constitution contains such affirmations explicitly in the text. Several state constitutions go further, explicitly denoting state power as a “public trust” or some variant of the phrase,<sup>229</sup> and even in some cases

225. MICH. CONST. art. XII, § 1.

226. LOCKE, *supra* note 180, at § 149, at 427 (calling for abolishment of the “trust” reposed by the people where the legislature acts in conflict with the trust or outside its scope).

227. See, e.g., COLO. CONST. art. II, § 1 (“All political power is vested in and derived from the people; all government, of right, originates from the people, is founded upon their will only, and is instituted solely for the good of the whole.”).

228. See ARK. CONST. art. II, § 2 (“All men are created equally free and independent, and have certain inherent and inalienable rights; amongst which are those of enjoying and defending life and liberty; of acquiring, possessing and protecting property, and reputation; and of pursuing their own happiness.”).

229. Some state constitutions use the word “trust” to describe the legislative duty. See ALA. CONST. art. IV, § 60 (“No person convicted of embezzlement of the public money, bribery, perjury, or other infamous crime, shall be eligible to the legislature, or capable of holding any office of trust or profit in this state.”). Others contain provisions explicitly requiring that legislation—usually for appropriations and/or taxes—be passed only for public purposes. See ALASKA CONST. art. 9, § 6 (“No tax shall be levied, or appropriation of public money made, or public property transferred, nor shall the public credit be used, except for a public purpose.”).



reserving to the people an explicit "right of revolution."<sup>230</sup> Finally, many state constitutions, in Lockean fashion, proclaim that the rights they enumerate are "excepted out of the power of government," as the retained rights of an entrustor are excepted out of the powers of a fiduciary.<sup>231</sup> Reading their provisions more holistically reveals that state constitutions evince a distrust of legislative use of power that comports well with the residual fear of legislative tyranny that animated the Lockean conception of the legislature as a duty-limited fiduciary of the public trust.<sup>232</sup>

Once we understand that state constitutions stand on fiduciary foundations, it remains to inquire whether the fiduciary duties of the legislature have any operation where a state constitution has stated a more precise duty to legislate, as all state constitutions do on the subject of education, or whether the terms of the stated duty should be the sole bounds of enforceability. As discussed above, education duties are stated in either mandatory or admonitory terms, depending on the state, and both mandatory and admonitory

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230. Some state constitutions claim this right expressly. See ARK. CONST. art. II, § 1 ("All political power is inherent in the people and government is instituted for their protection, security and benefit; and they have the right to alter, reform or abolish the same, in such manner as they may think proper."); COLO. CONST. art. II, § 2 ("The people of this state have the sole and exclusive right of governing themselves, as a free, sovereign and independent state; and to alter and abolish their constitution and form of government whenever they may deem it necessary to their safety and happiness, provided, such change be not repugnant to the constitution of the United States."); KY. CONST. § 4 ("All power is inherent in the people, and all free governments are founded on their authority and instituted for their peace, safety, happiness and the protection of property. For the advancement of these ends, they have at all times an inalienable and indefeasible right to alter, reform or abolish their government in such manner as they may deem proper"). Most do not, but many nevertheless imply the right to revolt by explicitly stating that the government's action outside its powers constitutes "tyranny" or "oppression." See ALA. CONST. art. I, § 35 ("That the sole object and only legitimate end of government is to protect the citizen in the enjoyment of life, liberty, and property, and when the government assumes other functions it is usurpation and oppression.").

231. See, e.g., ALA. CONST. art. I, § 36 ("That this enumeration of certain rights shall not impair or deny others retained by the people; and, to guard against any encroachments on the rights herein retained, we declare that everything in this Declaration of Rights is excepted out of the general powers of government, and shall forever remain inviolate."); ARK. CONST. art. II, § 29 ("[W]e declare that everything in this article is excepted out of the general powers of the government; and shall forever remain inviolate; and that all laws contrary thereto, or to the other provisions herein contained, shall be void.").

232. See, e.g., FLA. CONST. §§ 10-12 (directing the legislative power at specific objects); *id.* § 4 (placing procedural restrictions on legislative action, including requirements for transparency, such as the public reading of each bill); see also Fritz, *supra* note 182 (outlining the increasing distrust of legislative power that led to the adoption or expansion of such provisions in the nineteenth century).

education clauses contain varying standards of quality.<sup>233</sup> In the past, scholars and some courts have attempted to categorize the fifty states based on whether qualitative language in state constitutional education clauses calls for more or less effort from the state legislature in funding the education system. Under this categorical framework, each state's education clause is grouped with others depending on the strength of its qualitative terms.

Gershon Ratner was the first to group the state education clauses together into four such categories for the purpose of enforcing the duties therein.<sup>234</sup> Ratner explains the categories as follows:

Provisions in the first group contain only general education language and are exemplified by the Connecticut Constitution: "There shall always be free public elementary and secondary schools in the state." Provisions in the second group emphasize the quality of public education, as illustrated by the New Jersey Constitution: "The Legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in this State between the ages of five and eighteen years." Provisions in the third group contain a stronger and more specific education mandate than those in the first and second groups. Typical is the Rhode Island Constitution, which requires the legislature "to promote public schools and to adopt all means which they may deem necessary and proper to secure . . . the advantages . . . of education." Finally, provisions in the fourth group mandate the strongest commitment to education. This group is exemplified by the Washington Constitution: "It is the paramount duty of the state to make ample provision for the education of all children residing within its borders."<sup>235</sup>

Later scholars adopted Ratner's approach and applied it specifically to school finance litigation, the primary means by which states now interpret their education clauses in the courts.<sup>236</sup>

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233. See *supra* notes 62–77 and accompanying text (discussing the different state education clauses).

234. Ratner, *supra* note 49, at 814–16. Ratner's study was preceded by one other that grouped the clauses but for a different purpose. See Erica Black Grubb, *Breaking the Language Barrier: The Right to Bilingual Education*, 9 HARV. C.R.-C.L. L. REV. 52, 66–70 (1974). After the rise of the "third wave," perennial school finance commentator William Thro adopted Ratner's category method of analysis.

235. See Ratner, *supra* note 49, at 815–16.

236. See William E. Thro, *The Role of Language of the State Education Clauses in School Finance Litigation*, 79 EDUC. L. REP. 19, 23–25 (1993). Thereafter, the category approach quickly became the standard way to talk about education clauses. See, e.g., Coal. for Adequacy & Fairness in Educ., Inc.

These scholars, and intuitively many observers, predicted that the differences in state constitutional education clause text would make for differences in enforcement. However, empirical scholarship has not borne out the predictions that these categorical methods would have justified.<sup>237</sup> States with lower-duty provisions have been the locus of sweeping judgments and multidecade court supervision of remedies. For example, New Jersey's constitution calls only for a "thorough and efficient" education,<sup>238</sup> but the state's supreme court has issued decisions in no less than twenty-five appeals and has supervised the remediation of the system since the late 1970s with no end in sight, and New Jersey is one of the highest spending states in the country.<sup>239</sup> Similarly, lower-spending states with higher-duty education clauses, such as Georgia,<sup>240</sup> have adjudicated in favor of the state in education clause litigation based on legislative deference and separation of powers.<sup>241</sup> Nevada, a low-spending state, has not experienced any direct challenge to the adequacy of its education system,<sup>242</sup> though it has what would be

v. Chiles, 680 So. 2d 400, 405 n.7 (Fla. 1996) (employing the category approach, as adopted by Thro).

237. See Yohance C. Edwards & Jennifer Ahern, *Unequal Treatment in State Supreme Courts: Minority and City Schools in Education Finance Reform Litigation*, 79 N.Y.U. L. REV. 326, 353–61 (2004) (finding no significant relationship between education clause language, defined by the category approach, and case outcomes); Paula J. Lundberg, *State Courts and School Funding: A Fifty-State Analysis*, 63 ALB. L. REV. 1101, 1107–14 (2000) (reaching similar conclusions); Karen Swenson, *School Finance Reform Litigation: Why Are Some State Supreme Courts Activist and Others Restrained?*, 63 ALB. L. REV. 1147, 1164–80 (2000) (finding the same). But see Bauries, *supra* note 129, at 713 n.57 (explaining the limitations of Bill Swinford's study); Bill Swinford, *A Predictive Model of Decision Making in State Supreme Courts: The School Financing Cases*, 19 AM. POL. RES. 336, 347 (1991) (finding a relationship in the equity-based cases during the second wave).

238. N.J. CONST. art. VIII, § 4, ¶ 1 ("The Legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in the State between the ages of five and eighteen years.").

239. According to a recent study by *Education Week*, New Jersey spends an average of \$13,238 per pupil, compared with a national average expenditure per pupil of \$9,644. *Quality Counts 2009*, EDUC. WK., [http://www.edweek.org/apps/qc2009/state\\_compare.html#table\\_5](http://www.edweek.org/apps/qc2009/state_compare.html#table_5) (last visited Sept. 17, 2012).

240. GA. CONST. art. VIII, § 1, ¶ 1 ("The provision of an adequate public education for the citizens shall be a primary obligation of the State of Georgia.").

241. See, e.g., *McDaniel v. Thomas*, 285 S.E.2d 156 (Ga. 1981).

242. In *Guinn v. Legislature*, a dispute between the governor of Nevada and the state legislature over whether the legislature was required to provide funding for a previously approved state education budget, the Supreme Court of Nevada, citing the state constitution's education clause and holding that it superseded a later-adopted amendment to the state constitution requiring a supermajority for all tax increases, ordered the legislature to approve the tax increases required to fund the previously approved state education budget by simple majority. See *Guinn v. Legislature*, 76 P.3d 22, 34 (Nev. 2003).

termed a Category II education clause,<sup>243</sup> similar to that of New Jersey,<sup>244</sup> which has been embroiled in litigation over its education clause for more than four decades with no end in sight.<sup>245</sup>

Undeterred, prominent theorists of school finance have continued to search for cases in which the text of the state constitution has made a predictable difference in the outcome.<sup>246</sup> Of course, examples exist, but no trends in the cases suggest that similar language in state constitutional education clauses leads to similar results. Thus, one is left to wonder why. The most plausible explanation for the lack of predictability in results based on constitutional language is that the language at issue is hopelessly indeterminate.<sup>247</sup> Courts applying “strong-sounding” constitutional language are about as likely to issue rulings abdicating judicial review as courts applying “weak-sounding” constitutional language and about as likely to issue plaintiff-friendly judgments.

Given the indeterminacy of the language used in each education clause—and in light of Dinan and Eastman’s findings to the effect that the provisions were likely not designed to provide courts with qualitative standards for enforcement—it is most plausible to conclude that the education clauses in the states, if they are to be judicially enforced, must be enforced in their general, and not their specific, terms. Thus, rather than attempting to figure out what “thorough” means, and whether “thorough” means something different from “adequate,” “sufficient,” “ample,” or “high quality,” courts should recognize that the specific terms chosen in each education clause are best read as general commands or admonitions

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243. NEV. CONST. art. XI, § 2 (“The legislature shall provide for a uniform system of common schools, by which a school shall be established and maintained in each school district at least six months in every year, and any school district which shall allow instruction of a sectarian character therein may be deprived of its proportion of the interest of the public school fund during such neglect or infraction, and the legislature may pass such laws as will tend to secure a general attendance of the children in each school district upon said public schools.”).

244. N.J. CONST. art. VII, § 4, ¶ 1 (“The Legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in the State between the ages of five and eighteen years.”).

245. See Bauries, *supra* note 3, at 334 (discussing the New Jersey litigation saga).

246. See, e.g., William E. Thro & R. Craig Wood, *The Constitutional Text Matters: Reflections on Recent School Finance Cases*, 251 EDUC. L. REP. 520 (2010), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1658971](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1658971).

247. One scholar has described the clauses as “inherently nebulous,” a characterization with which I agree. See Clayton P. Gillette, *Reconstructing Local Control of School Finance: A Cautionary Note*, 25 CAP. U. L. REV. 37, 37 (1996).

to the legislature to seek what the South African Constitution terms the "progressive realization" of a goal.<sup>248</sup>

However, based on the fiduciary nature of the legislative responsibility, this "progressive realization" should be directed not at the specific adjectives contained in a state's education clause but at the general goal these terms attempt to reflect—a system that educates the people as the beneficiaries of a public educational trust.<sup>249</sup> The next Part considers how courts might approach education clauses from this perspective, focusing on the education duty as an example from which principles of enforcement of other affirmative duties may be derived.

### III. ENFORCING THE EDUCATION DUTY

Most state courts that have encountered education clause litigation have expressed the familiar maxim of state-court judicial review that every presumption in favor of the constitutionality of a challenged statute should be indulged; that is, a statute must not be held unconstitutional unless its infirmity is shown "beyond a reasonable doubt."<sup>250</sup> This rule of review stems from the background conception of state legislative power as "plenary."<sup>251</sup> Interestingly, though, the courts never connect up the idea of plenary legislative power with the political theory that underlies

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248. See S. AFR. CONST. art. I, § 29 (1996) (providing for a "right . . . to further education, which the state, through reasonable measures, must make progressively available and accessible"). See generally *Govt. of the Rep. of S. Afr. v. Grootboom* 2001 (1) S.A. 46 (CC) (calling for progressive realization of the goal of expanding access to housing).

249. Nearly every state views its education system and the funds used to pay for it explicitly as a public trust. See, e.g., OHIO CONST. art. VI, § 2 ("The general assembly shall make such provisions, by taxation, or otherwise, as, with the income arising from the school trust fund, will secure a thorough and efficient system of common schools throughout the state; but, no religious or other sect, or sects, shall ever have any exclusive right to, or control of, any part of the school funds of this state.").

250. See, e.g., *Davis v. State*, 804 N.W.2d 618, 628 (S.D. 2011) ("In the present case, the plaintiffs have the burden of persuading the Court beyond a reasonable doubt that the public school system fails to provide students with an education that gives them the opportunity to prepare for their future roles as citizens, participants in the political system, and competitors both economically and intellectually, and that this failure is related to an inadequate funding system."); see also *Usman*, *supra* note 5, at 1478–79 (providing examples from Kentucky and Colorado).

251. William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 503 (1977); Robert A. Schapiro, *Judicial Deference and Interpretive Coordinacy in State and Federal Constitutional Law*, 85 CORNELL L. REV. 656, 695 (2000); *Usman*, *supra* note 5, at 1479; see also James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 146 (1893) (illustrating the ubiquity of the rule, as well as its resilience in the face of challenges, in early state constitutional adjudication).

it—Locke's theory of the "supreme" legislature,<sup>252</sup> a theory that indeed justifies broad power and discretion, but which also imposes fiduciary duties.<sup>253</sup> Because of this failure, the courts fail to properly calibrate the deference that is owed to the legislature, resulting in both overenforcement and underenforcement of state constitutional education clauses.

If courts are to accept my account, then the natural question that will follow is, of course, what this acceptance will mean for judicial review in the states. As discussed above, the law of negative rights has developed doctrines quite consistent with a fiduciary theory of government. The various doctrines by which courts enforce negative rights and weigh these rights against broad public interests appear to be applications of a legislative (and executive, in many cases) duty of loyalty. Explicit affirmative duties, however, require courts to elucidate the more difficult concept of a legislative duty of due care<sup>254</sup> in the context of the explicit affirmative duty. I turn to this concept now.

#### A. *The Legislative Standard of Care*

The law recognizes many types of relationships as fiduciary relationships, and each carries with it a slightly different level of obligation.<sup>255</sup> Some, such as a trust with one settler, one beneficiary, and one trustee, are simple.<sup>256</sup> Others, such as mutual funds and ERISA-protected benefit plans, are highly complex, multilevel arrangements.<sup>257</sup> Some fiduciary duties arise due to a subordinate agency, such as the fiduciary duty of loyalty that an employee owes an employer while employed.<sup>258</sup> Others arise due to a personal representation, such as the fiduciary duty of an attorney to a client.<sup>259</sup> But the fiduciary relationship that fits best as an

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252. See *supra* note 185 and accompanying text (discussing Locke's theory of legislative primacy).

253. See *supra* notes 180–200 and accompanying text (discussing Locke's conception of the legislature as the people's fiduciary).

254. There is some dispute over whether the duty of care is even a fiduciary duty. Kelli A. Alces, *Debunking the Corporate Fiduciary Myth*, 35 J. CORP. L. 239, 250 (2009); William A. Gregory, *The Fiduciary Duty of Care: A Perversion of Words*, 38 AKRON L. REV. 181, 183 (2005). Nevertheless, it seems that the best way to see the duty of care is as a duty that applies to fiduciaries, but not only to fiduciaries.

255. See Austin W. Scott, *The Fiduciary Principle*, 37 CALIF. L. REV. 539, 541 (1949).

256. *Id.*

257. See, e.g., Christopher R. Stevenson, *Abusing Abuse of Discretion: Judicial Review of ERISA Fiduciaries' Discretionary Decisions in Denial of Benefits Cases*, 27 HOFSTRA LAB. & EMP. L.J. 105, 111–12 (2009) (reviewing the adoption of trust law principles to adjudicate individual claims against ERISA fiduciaries).

258. Scott, *supra* note 255, at 541.

259. *Id.*

analogy for the entrustment of legislative power to a legislature by the people is the relationship that arises between a corporate board of directors and the shareholders of a corporation.

The parallels between corporate boards and legislatures are too compelling to dismiss. Both legislatures and corporate boards serve in a representative capacity, elected by those represented and entrusted to make decisions on their behalf, with the entrustors retaining the ultimate check on the use of this authority by virtue of their power to replace the representatives at periodic elections.<sup>260</sup> Both have duties to make policy in the best interests of the entire body they represent, not just the majorities who elected them, and both must balance competing considerations in allocating scarce resources to maximize these interests. Like corporate boards, legislatures would see their functions greatly impaired through constant litigation seeking post-hoc reversal or modification of decisions made in the course of carrying out these duties, and both would benefit from qualified protection from judicial overreach in evaluating policy decisions.<sup>261</sup> Indeed, Professor Franklin Gevurtz has demonstrated that state constitutional representative governance owes much to the practices of the corporations that colonized Massachusetts and Virginia, as the charters of these corporations eventually became the first state constitutions.<sup>262</sup> If the legislature of a state is a fiduciary, it makes sense to treat the state legislature similarly to the private fiduciary to which it is most analogous—a corporate board.

For a corporate board, the duty of due care is defined, at least in the practical sense, by the business judgment rule. Although the business judgment rule is highly controversial and is the subject of reams of corporate law scholarship,<sup>263</sup> resolving the many disputes that the rule in its many forms has generated is far beyond the scope of this Article. For current purposes, I employ the business judgment rule in its idealistic sense, as stated in the American Law

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260. Many have criticized the corporate election process, but each of these critiques also finds its way into critiques of legislative electoral processes, such as partisan gerrymandering. That both systems are flawed in similar ways supports the analogy.

261. See, e.g., Andrew S. Gold, *A Decision Theory Approach to the Business Judgment Rule: Reflections on Disney, Good Faith, and Judicial Uncertainty*, 66 MD. L. REV. 398, 436, 436 n.246 (2007) (briefly reviewing these and other justifications for the rule).

262. Franklin A. Gevurtz, *The Historical and Political Origins of the Corporate Board of Directors*, 33 HOFSTRA L. REV. 89, 113–15 (2004).

263. See Franklin A. Gevurtz, *The Business Judgment Rule: Meaningless Verbiage or Misguided Notion*, 67 S. CAL. L. REV. 287, 289 (1994) (arguing that the rule is both unnecessary and misguided); Gold, *supra* note 261, at 432–36 (outlining some of the disagreements and concluding that the rule is an example of an “incompletely theorized agreement”—a doctrine that generates results on which most can agree, but which fails to achieve consensus as to its theoretical justification).

Institute's *Principles of Corporate Governance*.<sup>264</sup> Under this formulation of the rule, a director will not be held liable for a decision made on behalf of the corporation if the director "is informed with respect to the subject of the business judgment to the extent the director or officer reasonably believes to be appropriate under the circumstances,"<sup>265</sup> and if the director "rationally believes that the business judgment is in the best interests of the corporation."<sup>266</sup>

Applied to the legislative context,<sup>267</sup> this formulation might seem familiar. It contains elements of both information gathering and rationality. These elements have found their way into different doctrines of constitutional law in the federal courts in the past. Information gathering calls to mind the jurisprudence of Congress's enforcement power under section five of the Fourteenth Amendment, a test of the scope of Congress's discretionary legislative authority to legislate.<sup>268</sup> Of course, the rational belief element calls to mind the rational basis test, a test applicable to claims of violations of individual negative rights of relatively low importance.<sup>269</sup> But how might the business judgment formulation make these familiar doctrines work differently in the context of affirmative duties to legislate?

Education duty claims are not claims that a power has been exceeded or that a right has been violated—the traditional forms of constitutional claims, both of which sound in the duty of loyalty. Rather, education duty claims are claims that a state legislature has acted insufficiently, either by not legislating at all (and thereby

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264. See ALI, *supra* note 208, § 4.01(c).

265. *Id.* § 4.01(c)(2).

266. *Id.* § 4.01(c)(3).

267. It should be noted here that this Article does not propose holding legislators accountable individually for breach of the legislature's duty of care. The duty to exercise due care in fulfilling an affirmative legislative duty to legislate is a duty that falls upon the legislature as a body and one that is breached only when legislation is passed pursuant to a process that violates the general duty. See Thro, *supra* note 3, at 698–99 (making the point that all school finance litigation presents as facial challenges, and like a challenge to Congress's exercise of its Commerce Power, the violation of the state constitutional duty to fund an education system is complete when the legislation is signed); see also Rosenkranz, *supra* note 28, at 1273–80 (making the same point about several congressional powers). Under these formulations, and the one presented herein, which is consistent with them, even if a substantial number of individual legislators violated their duties, if the majority that passed the legislation fulfilled the general duty of care, then the legislation should stand.

268. See *supra* note 193 and accompanying text (discussing the section five power and *Garrett*).

269. This is true although a significant, and in my estimation well-taken, critique of the rational basis test is that it does not require the ultimate "basis" that upholds a challenged law to have been the actual basis for that law. See Neily, *supra* note 190, at 899–900.



arguably violating a duty of obedience to the legislative command),<sup>270</sup> or by legislating insufficiently well (and thereby violating the duty of due care).<sup>271</sup>

In some sense, it can be said that state courts have all along been engaging in attempts to enforce a legislative duty of care in school finance litigation. Decisions in favor of plaintiffs often reference care-based concepts, such as “inaction” and “insufficient action.”<sup>272</sup> But the decisions in favor of plaintiffs have been undertheorized, and as a result, the courts reaching the merits have overenforced state constitutional education clauses. Examples of this overenforcement abound, but we need review only one to get a sense of the problem. In Kentucky, the state constitution’s education clause states merely that the legislature has the duty to establish “an efficient system of common schools.”<sup>273</sup> Despite this minimalist language, the Supreme Court of Kentucky in 1989 issued a sweeping declaration, not only that the state education legislation that allowed for wide and irrational disparities in funding was unconstitutional but also that the word “efficient” called for a system containing nine principles, one of which incorporated seven “capacities” or learning goals.<sup>274</sup> This ruling was then adopted or relied on in nearly every other successful state court case for the next two decades nationwide, regardless of differences in the substantive language of the education clauses among the states.<sup>275</sup>

On the other side of the ledger, state courts that approach education clause litigation in the traditional vein—whereby rights that are violated require remediation, and whereby large-scale violations require large-scale remediation, such as the structural injunctions familiar from federal institutional reform litigation—have balked. Based on both remedial concerns and the indeterminacy of education clause language, about a third of state courts presented with education clause claims have dismissed the claims as nonjusticiable.<sup>276</sup> Where activist courts such as

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270. For an explanation of the duty of obedience in the nonprofit corporation context, see Nicole Huberfeld, *Tackling the “Evils” of Interlocking Directorates in Healthcare Nonprofits*, 85 NEB. L. REV. 681, 703–08 (2007).

271. See *supra* note 267 (discussing the duty of care in the affirmative duties context).

272. See, e.g., *Seattle Sch. Dist. No. 1 v. State*, 585 P.2d 71, 80 (Wash. 1978) (“Declaratory procedure is peculiarly well suited to the judicial determination of controversies concerning constitutional rights and, as in this case, the constitutionality of legislative action or inaction.”).

273. KY. CONST. § 183.

274. *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 212–13 (Ky. 1989).

275. See Scott R. Bauries, *Foreword: Rights, Remedies, and Rose*, 98 KY. L.J. 703, 709–10 (2010); *supra* notes 166–67, 173, and accompanying text (discussing *Rose*).

276. See Bauries, *supra* note 3, at 325–27 (discussing cases resulting in outright dismissals at the premerits phase).

Kentucky's have overenforced their constitutions, restraintist courts such as Illinois's have underenforced theirs. Applying the corporate model of the duty of care allows for a workable path between these two extremes.<sup>277</sup>

Primarily, under the business judgment rule, the corporate board's duty of care is a *procedural* duty to carefully consider evidence and to remain attentive to business realities in making decisions.<sup>278</sup> This is a duty to avoid negligence, but a particular kind of negligence—negligence in failing to consider relevant information reasonably available to the director-fiduciary. As noted above, the *Principles of Corporate Governance* add to this consideration of material and relevant information the idea that the ultimate decision must be one that the director “rationally believes” to be in the best interests of the corporation and shareholders.<sup>279</sup> This standard has the feel of a subjective, good-faith test, but the word “rationally,” rather than the word “believes,” does all of the work. Nevertheless, the idea that the ultimate decision must be “rational” or based on a “rational consideration” or “rational belief” is simply a way for courts to gauge whether the material and relevant information required to be considered has, in fact, been considered.

For example, imagine a corporate decision based on overwhelming and completely uncontradicted information indicating that voting in favor of a proposed merger would bankrupt the company. But imagine, further, that the directors vote in favor of the merger, and the company goes bankrupt. In such a case, it would be difficult to argue that the board failed to consider relevant information reasonably available to it if the information were presented to the board and this presentation were reflected in the minutes, perhaps accompanied by several board members' statements that they viewed a merger to be in the best interests of the shareholders. Rather, in voting in favor of the predictably disastrous merger, the board would appear to have acted with something other than a “rational belief” that the corporation's best interests would be served by a “yes” vote. Where an ultimate decision does not rationally follow from the information considered, then a recitation in the minutes of a board meeting that the

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277. Other scholars have, in the past, proposed mediate approaches, but these proposals have not focused on mediating the merits—only the remedy. See, e.g., Brown, *supra* note 134, at 550–56 (arguing in favor of a “middle ground” approach, which would require dialogue during the remedial phase, but not particular judicial deference on the merits); Obhof, *supra* note 134, at 593–96 (advocating a similar approach).

278. See Alces, *supra* note 254, at 251 (“[T]he standard [of the corporate duty of care] is a procedural one. In order to fulfill the ‘duty of care’ directors must only be sure to inform themselves regarding business decisions they make on the corporation's behalf and must exercise the most rudimentary monitoring of the corporate enterprise.”).

279. ALI, *supra* note 208, § 4.01(c)(3).

information was in fact carefully considered should not be credited as true, and the decision should be subject to judicial correction. Thus, even gilded with the substantive-sounding language of "rational belief," the character of the corporate duty of care remains procedural at its core.

### B. *Adjudicating Affirmative Duties*

As they generally do in the corporate context, state supreme courts should approach all education clause claims against state legislatures with the skepticism reflected in the political question doctrine. Education clause language is inherently indeterminate, meaning different things to different judges, and current approaches to such indeterminacy have either added so much content to the clauses as to make their initial terms meaningless or have caused judicial abdication, rendering the language nugatory. With the foregoing analysis in mind, state courts should defer to legislative discretion in applying the nebulous terms of education clauses, but they should draw from private corporate law to apply a state-specific approach to deference distinct from the overly harsh practice of total abstention from the merits that results from an unthinking application of the federal political question doctrine.<sup>280</sup>

Where state constitutional affirmative legislative duties are subject to challenge, courts should limit initial review to process, rather than substance.<sup>281</sup> Few large-scale legislative enactments occur without being preceded by a significant amount of information gathering and consideration. The committee structure of Congress has largely found its way into state legislatures, and these bodies have adopted the norms of consideration and reconsideration of issues before adoption that are familiar to Congress. Where this sort of careful consideration occurs in enacting a state school finance system, the system should not be struck down as "inadequate" because, despite the enactment process, flaws remain. Rather, a

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280. See Rachel E. Barkow, *More Supreme than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237, 258–63 (2002) (describing the abstention function of the political question doctrine).

281. *Smith v. Van Gorkom*, 488 A.2d 858, 874 (Del. 1985) (holding that board members who voted to approve a merger after only two hours of debate and without reviewing any documentation regarding the adequacy of the proposed purchase price violated the duty of care), *overruled on other grounds* by *Gantler v. Stephens*, 965 A.2d 695, 710 n.45 (Del. 2009). Most corporate cases appear to conceive of the business judgment rule as a standard of review, rather than a rule of abstention. *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984), *overruled on other grounds* by *Brehm v. Eisner*, 746 A.2d 244 (Del. 2000) (reaffirming the business judgment standard but rejecting the appellate standard of review). But some scholars favor the "abstention" approach. See Stephen M. Bainbridge, *The Business Judgment Rule as Abstention Doctrine*, 57 VAND. L. REV. 83, 90 (2004).

state education finance plan should be struck down only where the legislature, in enacting a school finance system, failed to consider relevant, material information, or where its ultimate plan could not have been rationally based on the actual information presented to it.

Of course, such a deferential approach will make plaintiff victories significantly rarer, but where a case presents a wholesale challenge to the overall “adequacy” of a state financing system—as Professor William Thro puts it, a “facial challenge”<sup>282</sup> to school financing legislation—plaintiff victories should indeed be rare. This conclusion need not mean that plaintiffs cannot challenge failures of equal protection, and it need not even mean that individual plaintiffs cannot challenge the inadequacies of their own individual educational services from the state. It does, however, mean that a court challenge to an entire legislative scheme based on the substantive terms of a state’s education clause should meet a high burden of establishing a breach of the legislature’s duty of care.

Thus, to win an education clause case, a plaintiff should show that the legislature has essentially abdicated its role by failing to act at all in the face of obvious needs, or by acting without due care by failing to consider relevant, material, and available information about the state’s existing education system’s needs and flaws.<sup>283</sup> Importantly, such showings would be much easier to make in the legislative context, where the press keeps a watchful eye on legislative deliberations and information gathering, than in the business context, where much deliberation occurs in private meetings. Such press attendance would operate as a powerful check on cynical, pro forma types of “deliberation” and information presentation designed only to satisfy the procedural standard as a subterfuge.

With this in mind, any court determining that the constitution has been violated should not feel constrained to abstain from the remedial phase, as many courts in the current regime have.<sup>284</sup> Rather, courts finding for the plaintiffs should make specific orders for remediation, as any separation-of-powers-based concerns should have been addressed through the process of overcoming such a deferential scheme of review. The most natural such order would be an injunction against the use of the current unconstitutional legislative scheme, which would provide a strong signal (albeit not a direct judicial command) to the legislature that it must act immediately to replace the legislation. Such an injunctive order

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282. See Thro, *supra* note 3, at 688 (arguing that, properly conceived, all education clause litigation presents facial challenges).

283. As discussed below, the “costing-out” studies now familiar to the remedial stages of school finance litigation would seem to fit naturally within this category. See Wood & Baker, *supra* note 172, at 143–58 (discussing educational adequacy cost studies).

284. See Bauries, *supra* note 129, at 735 (discussing remedial abstention).

need not even run directly against the legislature itself to be effective, and it would therefore not present the kinds of separation of powers problems that worry courts where the prospective remedy might be a requirement to increase funding, which inherently must run against the legislature.<sup>285</sup>

### C. *Enforcement and Systemic Change*

Remediation that consists solely of an order preventing the use of the unconstitutional statutory scheme is likely to accomplish an important purpose of judicial review of fiduciary action—informing the entrustors that the fiduciary has breached their trust. According to Professor David Law, constitutional courts serve a vital role in protecting popular sovereignty by signaling to the populace that a constitutional principle has been breached by legislative action.<sup>286</sup> Challenges to the popular monitoring of legislative action include the lack of information available to the public as to the meaning of constitutional provisions and the facts surrounding a legislative act. Courts help to remedy this lack of information by providing recognizable, authoritative, and public signals as to whether the legislature has acted unconstitutionally and, if so, to what extent the people should be alarmed about it.<sup>287</sup> Such signaling enables the people to assert their popular sovereignty by (1) coordinating in disapproval, and if necessary, (2) coordinating in action (e.g., voting, protesting, rebellion, etc.).<sup>288</sup>

Law's conception of the function of judicial review fits neatly into the fiduciary framework that I have outlined here. True to Locke's idea of a residual right of revolution in the people, Law sees the function of the judiciary as providing information to the people that they cannot secure for themselves, that they may deliberate about it and act in ways stopping short of outright revolution, but signaling to the public's fiduciary that there has been a breach of the public trust.<sup>289</sup> The model I have outlined here enables this sort of signaling, but incentivizes state courts to be careful about sending a signal by making the path to that signal difficult and by limiting the judiciary's role to the quality of the legislative process rather than the quality of its product.

Some might worry that, if accepted, the framework presented here will lead to the obliteration of valuable differences among state

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285. See, e.g., Dunn & Derthick, *supra* note 128, at 322–23.

286. See David S. Law, *A Theory of Judicial Power and Judicial Review*, 97 GEO. L.J. 723, 774 (2009).

287. *Id.* at 777.

288. *Id.* at 778. As developed in a forthcoming piece by Ethan Leib, David L. Ponet, and Michael Serota, judges may also have fiduciary duties to the public, one of which is what the authors term “deliberative engagement,” a duty that this kind of signaling supports. See Leib et al., *Judging*, *supra* note 1.

289. See Law, *supra* note 286, at 774.

constitutions, thereby disrespecting the intent of the divergent groups of state constitutional framers over the course of American state constitutional history. But, assuming that such differences are both real and worth preserving,<sup>290</sup> an approach to the review of affirmative duties that applies an underlying, generalized fiduciary duty of care to the enforcement of such duties does not inevitably eliminate such differences. For example, in determining whether relevant, material information was in fact considered by the state legislature in making education policy, a court in, say, Montana could legitimately view a very different set of considerations as relevant and material than a court in, say, New York. Thus, accepting and enforcing the underlying general fiduciary duty of care does not portend the elimination of independent state constitutional jurisprudence in each state.

Proponents of the experimentalist reform of state school systems through the courts may also view the approach set forth above as dangerous to their goals.<sup>291</sup> However, the key to the experimentalist accounts is that a judicial decision destabilizes the status quo, thus allowing for (and incentivizing) extrajudicial cooperation from varied groups of stakeholders.<sup>292</sup> If I am correct, then these proponents should not see my approach as an affront to theirs. Although the experimentalist approaches thus far have assumed a merits judgment based on the quality terms of a state's education clause, their approach does not *require* the judgment to be founded on the quality terms. The experimentalist approach is an approach to remediation, not adjudication of the constitutional violation, and a procedural approach to judicial review can ground an experimentalist approach to remediation just as easily as a substantive approach to merits review can.

Moreover, the "destabilization" that proponents of the experimentalist approach laud as the factor that makes these suits successful may even be more effective if it occurs with less policy direction. In their model, destabilization works because it leads to protracted and cyclical negotiations between "new publics," presumably those stakeholders with the best interests of the institution in mind. But it seems that destabilization alone is preferable to destabilization and negotiation under court supervision, as the former allows the political process to operate naturally once destabilized, while the latter relies on our collective

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290. For a view critical of this assumption, see generally James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761 (1992). But see generally Hans A. Linde, *State Constitutions Are Not Common Law: Comments on Gardner's Failed Discourse*, 24 RUTGERS L.J. 927 (1993) (challenging Gardner's argument).

291. See Koski, *supra* note 98, at 1189; Liebman & Sabel, *supra* note 78, at 184–92; Sabel & Simon, *supra* note 78, at 1016–21.

292. See generally Sabel & Simon, *supra* note 78.

suspension of political processes in the making of policy. Such destabilization is much more likely to occur where a state supreme court disallows the continued use of a flawed school finance scheme than where it simply declares its disapproval of the scheme but does not enjoin its use.

More importantly, a persistent problem with education clause litigation as currently practiced is that quality social-science research concerning the needs of students and schools, along with the costs of providing for such needs, comes to light for the first time in litigation, or even during the remedial process, too often and then only as selected and presented by adversarial litigants whose interests may be narrower than those of the overall public.<sup>293</sup> A cottage industry of school funding experts has emerged over the past few decades, and these experts now do most of their work within the litigation process, either offering testimony to show that state school systems are inadequate, or performing “costing-out” studies pursuant to remedial plans after states lose suits or sign consent decrees.<sup>294</sup> Experimentalists hold that the consideration of this evidence during litigation and during the remedial process allows for a collaborative approach to public policy making, and I do not disagree. Nevertheless, it would be far preferable for this collaborative consideration of relevant and material social-science information to occur outside the adversarial litigation context, and a fiduciary approach incentivizes this kind of consideration while policy is being developed.

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293. See Wood & Baker, *supra* note 172, at 144–68 (reviewing the history of social science “costing-out” studies of educational equity and adequacy and identifying a then-emerging trend whereby advocacy groups conduct their own studies to support planned arguments in litigation); cf. William S. Koski, *Courthouses vs. Statehouses?*, 109 MICH. L. REV. 923, 933–936 (2011) (reviewing ERIC A. HANUSHEK & ALFRED A. LINDSETH, *SCHOOLHOUSES, COURTHOUSES, AND STATEHOUSES: SOLVING THE FUNDING-ACHIEVEMENT PUZZLE IN AMERICA’S PUBLIC SCHOOLS* (2009) and MICHAEL A. REBELL, *COURTS & KIDS: PURSUING EDUCATIONAL EQUITY THROUGH THE STATE COURTS* (2009)). After a very fair and even-handed review of two books with competing views, Professor Koski seems ultimately sympathetic to Professor Rebell’s view that the consideration of social science evidence by courts is not as problematic as critics would hold it to be, based primarily on the many tools that courts possess, such as the appointment of masters and monitors, to assist them with their work. *Id.* at 934–35. My own view is that it makes little difference whether the judiciary *can* consider social-science evidence before we consider whether it *should*. Professor Rebell’s argument makes the answer to the former question the answer to the latter as well. The adoption of the fiduciary approach presented herein clarifies that these are two separate inquiries and that the judiciary’s role in assessing social-science evidence is best limited to a determination of whether the social-science evidence a legislature considered was in fact relevant and material to its funding decision.

294. Wood & Baker, *supra* note 172, at 143–58 (reviewing the proliferation of this industry and critiquing the methodologies employed in expert costing-out studies).

Under the fiduciary approach, the courts retain an important role, but not a veto over state legislative discretion. Where a state legislature considers a costing-out study during the legislative process but rejects that study, for example, a fiduciary approach would at least require the legislature's representative in court to identify a principled reason for the rejection of the study. This reason would then become a part of a visible, public court record, and if the reason were unconvincing, then the public would have its signal that its legislative fiduciary does not have the interests of its entrustors in mind. Ultimately, the goal of both the approach I have laid out and the experimentalist approach is to get the legislature to perform its constitutional duty, and my way of providing the judiciary with an institutionally sound path to involvement secures this goal.

### CONCLUSION

In this Article, I have presented a fiduciary model of judicial review and applied it to the affirmative duties that American state constitutions impose on state legislatures to legislate in the field of education. The lessons of this analysis, however, apply to any affirmative legislative duty to legislate, and the fiduciary principles outlined above should serve as a guide for judicial review outside the education context where explicit affirmative legislative duties to legislate are at issue.<sup>295</sup> Of course, important questions remain, most prominently whether the duty-based analysis conducted above forecloses further rights-based analyses. I am inclined to answer that question in the negative, as the existence of a duty neither necessitates nor forecloses the existence of a right, but a full analysis of this difficult question will have to await future work.

Properly applied, a fiduciary approach has the potential to balance the judiciary's reluctance to exceed its traditional role with the need for limited, fall-back judicial review of grossly deficient or completely absent legislative deliberation on an important, often fundamental, policy issue. However, it also recognizes that legislative acts that apply statewide are often imperfect, that such

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295. Some state constitutions contain affirmative duties of this sort directed at subjects other than education. See, e.g., Hershkoff, *Welfare Devolution*, *supra* note 49, at 1407 nn.20–23 (citing articles outlining challenges based on state constitutional provisions requiring the legislative provision of welfare services, health care, education, and housing). In addition, many national constitutions contain these sorts of duties, often directed at multiple policy goals, including education. See, e.g., Eleanor D. Kinney & Brian Alexander Clark, *Provisions for Health and Health Care in the Constitutions of the Countries of the World*, 37 CORNELL INT'L L.J. 285, 291–301 (2004) (reviewing constitutions requiring the provision of health services); Dinah Shelton, *Human Rights, Environmental Rights, and the Right to Environment*, 28 STAN. J. INT'L L. 103, 103–04 n.5 (1991) (reviewing constitutions requiring the protection of the natural environment).



acts often result from numerous compromises and negotiations, and that the interest groups that feel that they are on the losing end of such compromises have a powerful motivation to bring lawsuits. Courts should default to a position of noninvolvement in these cases, but should retain the ability to become involved where the legislative deliberative process has broken down. The public trust deserves no less, but state courts should do no more.